S. HRG. 100-550

DEVELOPMENTS IN DRUG AND ALCOHOL TESTING

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

DEVELOPMENTS IN DRUG AND ALCOHOL TESTING

FEBRUARY 25, 1988

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE

83-232 O WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S261-38

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ERNEST F. HOLLINGS, South Carolina, *Chairman*

DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
DONALD W. RIEGLE, JR., Michigan
J. JAMES EXON, Nebraska
ALBERT GORE, JR., Tennessee
JOHN D. ROCKEFELLER IV, West Virginia
LLOYD BENTSEN, Texas
JOHN F. KERRY, Massachusetts
JOHN B. BREAUX, Louisiana
BROCK ADAMS, Washington

JOHN C. DANFORTH, Missouri
BOB PACKWOOD, Oregon
NANCY LANDON KASSEBAUM, Kansas
LARRY PRESSLER, South Dakota
TED STEVENS, Alaska
ROBERT W. KASTEN, JR., Wisconsin
PAUL S. TRIBLE, JR., Virginia
PETE WILSON, California
JOHN MCCAIN, Arizona

RALPH B. EVERETT, *Chief Counsel and Staff Director*
WALTER B. MCCORMICK, JR., *Minority Chief Counsel and Staff Director*

CONTENTS

	Page
Opening statement by the Chairman	1
Opening statement by Senator Danforth	5
Opening statement by Senator Riegle	6
Opening statement by Senator Trible	6
Opening statement by Senator Wilson	17
Opening statement by Senator Exon	18
Opening statement by Senator Pressler	34

LIST OF WITNESSES

Cooley, Dr. Thomas, on behalf of Safe Travel America	7
Cromwell, Edward W., brakeman; accompanied by Dan Goldstein, counsel	51
Gates, Ricky L.; accompanied by Donna Shearer; Carl Schlaich; and Deidre Bosley, counsels	35
Horn, Dr. Roger, on behalf of Safe Travel America	13
Johnson, Arthur, on behalf of Safe Travel America	11
Mann, Lawrence M., counsel, Railway Labor Executives' Assn.; accompanied by Daniel W. Collins, Jr., assistant general secretary/treasurer, United Transportation Union	56
Prepared statements:	
Mr. Mann	59
Mr. Collins	62
Riley, Hon. John H., Administrator, FRA; accompanied by Grady C. Cothen, Jr.	22

DEVELOPMENTS IN DRUG AND ALCOHOL TESTING

THURSDAY, FEBRUARY 25, 1988

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 10:20 a.m., in room SR-253, Russell Senate Office Building, Hon. Ernest F. Hollings [Chairman of the Committee] presiding.

Staff members assigned to this hearing: Robert Holleyman, staff counsel; Gerri Hall, minority professional staff member; and Alan Maness, minority staff counsel.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will please come to order.

Mr. Riley is still testifying over on the House side. He will be here momentarily, but our panel has agreed to go first, so we can start with our opening statements.

Good morning. Today the Commerce Committee turns its attention to a problem which, despite our best legislative efforts during the past year, continues to be one of the gravest confronting our national transportation network—the problem of drug and alcohol use by transportation employees.

The overall issue of drug and alcohol use—at the workplace and in the schools—has become a tremendously potent social problem in recent years. We thought it was bad 15 and 20 years ago. It's much worse today. And to those of us concerned about the future—about America's productivity and its ability to maintain its economic leadership in the world—the drug problem is especially troubling.

At today's hearing, we will focus on the more immediate danger drugs and alcohol represent when they are used unlawfully by those who operate the public conveyances—planes, trains, buses, and trucks.

During the past decade, we in Washington have had our little tryst with deregulation of transportation services. And now we've come full circle. We've learned a few things. And chief among them is that government—above all else—has a responsibility to provide for the safety of its citizens aboard and about the public conveyances.

We can take a variety of actions on the federal level to provide for an adequate margin of safety. We can increase the number of air traffic controllers and upgrade their equipment. We can provide for safety inspections of airplanes and rail equipment. We can ensure that roads and highways are built with safety in mind, and that vehicles are held to certain safety standards.

But no matter how hard we try to create optimum conditions for safety, there is always the human factor. As long as the possibility exists that an individual can throw the wrong switch, or misinterpret a signal, or fail to heed a mechanized warning, there is a chance that a serious mishap—and accompanying loss of life—can occur.

Early last year, a high-speed Amtrak passenger train en route from Washington, DC to Boston slammed into a freight locomotive near Chase, MD. The fiery crash killed 16 people and injured more than 170 others.

Subsequently, some very disturbing news came out of the Federal investigation into the crash. Investigators concluded that human error—rather than mechanical failure—was a probable cause. More specifically, it appears that the operator of the Conrail freight locomotive had ignored crucial warning signals that were commanding him to slow and then stop his vehicle prior to the junction where he would be placed on the same tracks as the Amtrak train.

But the most distressing news to come out of the investigation concerned the alleged use of illegal drugs by the crew of the Conrail freight locomotive. Urinalysis tests performed subsequent to the tragedy showed that the Conrail engineer and the brakeman had been using marijuana at some point prior to the crash.

With us today are the engineer and the brakeman from the Conrail locomotive involved in that tragedy. I hope the testimony of both these witnesses will give the committee a unique perspective of the problem that exists in the industry.

Following the Amtrak tragedy, and a subsequent hearing on the question of drug and alcohol testing in the transportation industries, this committee made two determinations. First, the on-the-job use of drugs and alcohol by transportation employees was by no means isolated to the Amtrak incident. And second, the best way to ensure that drug use will never again be a factor in a rail, motor carrier, or airline accident is to provide for drug and alcohol testing of rail, motor carrier, and airline employees.

Last year, this committee and the full Senate passed S. 1041, legislation which would require five types of testing—random, pre-employment, post-accident, periodic recurring, and upon reasonable suspicion. But it is the random testing provision that gives this legislation the teeth it needs for maximum effectiveness in preventing the use of drugs or alcohol on the job by safety-related transportation employees. This bill is now before conference committee as an amendment to the Air Passenger Protection Act, H.R. 3051.

I fully expect this hearing today will underscore the need for a drug and alcohol testing program in the transportation industries, and perhaps provide a boost for the legislation now in conference.

There's trouble on another front, though. Recently the Ninth U.S. Circuit Court of Appeals has called into question the constitutionality of the Federal Railroad Administration's current drug and alcohol testing program.

I just cannot understand this ruling. It is at odds with all other federal appeals court decisions regarding the constitutionality of government-mandated drug and alcohol testing programs. Heaven's above, the appeals court for the Third Circuit has upheld a drug and alcohol testing program for racehorse jockeys! Are we to say that we care more about the integrity of horse racing than we do about the lives of millions of Americans who use public transportation each day? I am hoping that FRA Administrator John Riley, as well as the representative from rail labor, Mr. Larry Mann, can shed some light on this decision.

Our committee's bill takes great care to ensure that transportation employees will be treated fairly. Any testing program would be required to include procedures to protect individual privacy, ensure accountability of specimens, require confirmation of all positive screening tests, mandate the use of only certified and accredited laboratories, provide confidentiality of test results and medical histories, and ensure nondiscriminatory and impartial testing.

In addition, we would require regulations to provide that the FAA, the airlines, and motor carriers establish drug and alcohol rehabilitation programs for employees who test positive or who step forward to receive help. Under current federal rules, railroad companies are already required to provide their employees with these programs.

Nonetheless, I suspect, the constitutional challenges will linger. But let me stress that we are not proposing universal drug testing or a program to rid the nation of illegal drugs. Rather, we are talking about people who are responsible for the lives of those who travel on these public conveyances. If we are to entrust them with our lives, we have every right to expect that they not use illegal drugs and that they not drink alcoholic beverages on the job. The plain and simple fact is that these people must be held to a higher standard. Constitutional issues should not stand in the way of safety.

Call it intimidation. Call it whatever you will. But the fact is that drug and alcohol testing—and particularly random testing—is the only method we have to reasonably ensure that transportation employees will not use drugs and alcohol on the job. There's documented proof of this. When the Coast Guard began random tests of uniformed personnel in 1983, the number of individuals testing positive was 10.3 percent. By fiscal year 1986, the figure had dropped to 3.8 percent.

When we talk about rights, there is a choice that we in government must make. That choice is between the transportation employee's right to privacy and the passenger's right to safe travel. There is absolutely no question as to where our priorities should be.

Airline pilots, air traffic controllers, mechanics, airport security personnel, truck and bus drivers, railroad engineers, railroad maintenance workers—all are directly responsible for the safe conveyance of

hundreds of thousands of Americans each day. When you or I step on board an Amtrak passenger train, or an airline flight, we have absolutely no way of ensuring our own safety for the duration of our trip. We have no option other than to trust those responsible for the safe operation of the train or plane.

The least we can do is provide a good foundation on which to base that trust. Right to the point, if you use illegal drugs you have no business operating a public conveyance. You have no business assuming responsibility for innocent lives.

The paramount function of government is the safety of its citizens. With this one simple step—the institution of drug and alcohol testing programs and particularly random testing—we can go a long way toward providing Americans with a safer and more reliable passenger transportation network.

I look forward to hearing the testimony of today's witnesses.

I would simply state that the purpose of the hearing is to put everyone on notice, the public, and more particularly, our House colleagues, that we are determined. The problem is real. The finding has been made for the safety of the traveling public that random testing as well as the other four tests are necessary.

We feel very strongly that the Constitution did not vitiate any original law, salus populi suprema lex, the safety of the people is the supreme law, and no one has a constitutional right to drive under the influence or fly under the influence. And we had unfortunately all of the human factors, statistical for example, to substantiate that particular finding.

We have found the worthiness of random testing by the Coast Guard where they started in 1983 with their random testing, and the percentage, those with incidence of drugs has fallen substantially since they started it; it has worked. And we are not a bit deterred by the Circuit Court finding recently that the program over at the Federal Railroad Administration of random testing is unconstitutional.

We have a finding by another Circuit Court that you can random test the jockeys in horse racing, and obviously this recent court decision finds that a horse race is more important than the human race. It will be set aside, I am convinced, by the Supreme Court itself because we do not only have that authority, we have that responsibility to the traveling public.

We have with us today the engineer and the brakeman of the tragic Amtrak collision in Chase, MD of last year. They have come voluntarily. It is not the intent of the committee to try their case but rather receive their observations with respect to their experience and the need for random testing, and I think they will present very valuable testimony in that particular regard.

Let me yield at this time to our ranking member and former Chairman, Senator Danforth.

OPENING STATEMENT BY SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much for holding this hearing. I think it is very timely.

Thirteen months ago, 16 people were killed in a collision between a string of Conrail locomotives and an Amtrak train carrying 200 people. It has been just over a year since the committee's last hearing on substance abuse in the transportation industries.

It has been 11 months since this committee voted 19 to 1 to report a bill on drug and alcohol testing of transportation workers, and it has been 17 weeks since the Senate voted by a margin of 83 to 7 to approve drug and alcohol testing, including random testing of airline crews, train crews, truck drivers and bus drivers. We still do not have this legislation, and the problem has not gone away.

On April 4 of last year, a bus drive drove into a bridge on the George Washington Parkway. He was driving a double-decker bus, and the top deck of the bus hit the bridge. One person was killed and 32 passengers were injured. The driver tested positive for cocaine, valium and marijuana.

On January 22, the FAA announced that it had removed two Kansas City air traffic controllers from duty after they tested positive for drug use. On January 28, the California Attorney General announced that a six month investigation of truck stops had resulted in drug arrests of 130 people, including 26 truck drivers. The Attorney General's undercover officers found that the trafficking over CB radios was so fast that by the time they had reached a drug seller, he frequently had already sold his drugs.

As we will learn shortly from the Federal Railroad Administrator, John Riley, the drug and alcohol problem in the rail industry remains serious. During January, a series of accidents occurred in which drug workers tested positive for drugs. The recent guilty plea to manslaughter of one of today's witnesses, Ricky Gates, is another grim reminder of this problem. Gates admitted smoking marijuana shortly before his Conrail locomotive ran stop signals and collided with an Amtrak train, killing 16 people. Despite these problems, two judges of the Ninth Circuit recently ruled against FRA's post-accident drug and alcohol testing rule. The judges' analysis would have us believe that a bettor who puts a wager on a horse is more deserving of protection from drug abuse than the traveling public.

It is time for Congress to act on substance abuse in the transportation industries. We are currently in conference with the House, and we must work swiftly to address a problem that is killing Americans every day.

If we succeed, it will be due in large part to the efforts of Safe Travel America. This group was formed in the wake of the Conrail-Amtrak crash. Several of its members are here today to urge action to improve safety. By sharing their pain, this grass roots movement has effectively communicated the urgent need to fight drug and alcohol abuse in the transportation industries.

Again, Mr. Chairman, thank you for holding the hearing.

The CHAIRMAN. Well, we thank you, and before I yield to our next colleague, let me ask Dr. Horn and Mr. Arthur Johnson and Dr. Colley to come around and have their seats at the table. That will save us a little time, I think.

Senator Riegle?

OPENING STATEMENT BY SENATOR RIEGLE

Senator RIEGLE. Thank you, Mr. Chairman.

First of all, I want to say to you, Mr. Chairman, how much I appreciate your taking the initiative to have this hearing today because this is a vitally important issue of public safety, and I think our witnesses today illustrate this problem in the most vivid form.

From that fatal Amtrak accident that has been already cited today, we have both family members of those who lost loved ones in that accident and as well, as you point out, we have the Conrail brakeman who has admitted the use of, and was found to have used drugs in terms of the problems leading up to that accident having taken place.

So I think this recent case being laid out today in this form and this fashion probably illuminates this problem as much as it can be.

Now, I must say, Mr. Chairman, that the recent Circuit Court decision which now throws into doubt the whole notion of post-accident drug testing poses a very difficult issue. Perhaps higher courts will overturn that decision, but I think we need to act, and of course, our committee has acted. We have produced legislation here, virtually unanimously, as has the Senate, but the months and weeks are ticking away, and we still do not have in place a solid answer in law to deal with this problem.

And the fact that we have family members now here at the table who have lost loved ones in accidents that could have been avoided and where drugs were involved I think demonstrates to us that we have got to have a better answer so that other families are not required to go through precisely this same kind of ordeal and tragedy.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, I agree, Senator. We want these families and everyone to know that we are not trying to make headlines, we are trying to make headway, and I am convinced this hearing will help us.

Senator Trible?

OPENING STATEMENT BY SENATOR TRIBLE

Senator TRIBLE. Mr. Chairman, thank you.

Let me just add a word to what has been said thus far. It is shocking to learn that drug use is up among railroad employees. Too many people still say yes to drugs, endanger themselves and countless others.

In the Conrail-Amtrak crash, 16 individuals died, and there are hundreds more, spouses, children, parents, brothers and sisters and friends, whose lives were forever changed because the individual driving that train used drugs.

That accident was over a year ago. Since then, many others have died needlessly because of drug use.

Let us be clear: there is no constitutional right to step into the cab of a train or bus high on drugs. It is the duty of government to intervene when necessary to protect its citizenry, and certainly the time has come for transportation employee drug testing. Hopefully this hearing will help provide the stimulus to break the deadlock on passing meaningful drug testing legislation. The Senate has already passed legislation, as we know, to require employee drug testing in the transportation field, and I would hope the House would accept our position so that together we can send a meaningful safety bill to the President and stop the needless slaughter of innocent life.

The CHAIRMAN. Thank you very much.

Perhaps we should start, Dr. Colley, with you.

STATEMENT OF DR. THOMAS COLLEY, ON BEHALF OF SAFE TRAVEL AMERICA

Dr. COLLEY. My name is Thomas Colley. I life in Shippensburg, Pennsylvania with my wife Susan. I am a member of the faculty of Shippensburg University.

I am not here, however, in my role as an academic. Rather, I am here as a passionately concerned citizen. I sat in what used to be my son's bedroom to prepare this statement. The room is no longer my son's bedroom because my son is dead. He died on January 4, 1987 near Chase, MD aboard an Amtrak train. He was just five weeks beyond his 18th birthday. His name was Thomas Carl Colley. Everyone called him T.C.

Last Monday after I told the students in my class that I would be away from campus on Thursday in order to provide testimony at this hearing, one of the young women in my class said I knew your son in high school. He was a nice boy. He was a good artist.

He was. He was a boy on the verge of manhood. He was changing, growing. His self-esteem and confidence were blossoming. He was discovering his own values, building his own life philosophy. He was finding his place in our adult world. Then our adult world killed him.

No more than ten minutes after the crash which crushed and burned him, the engineer of a Conrail train shared a marijuana cigarette with his companion in the cab of their moving locomotive. T.C. was in the second car of the Amtrak train. He and 15 other passengers died.

They died. We were devastated. During the nearly 14 months since that disgusting event, the citizens you see sitting at this table along with their wives and families have been involved nearly daily to extend every effort possible to effect some change, some growth, to see that nobody else's children will die in similar circumstances.

If you asked me to point a finger at the people responsible for that obscene train wreck, I would not have enough fingers available to point at all of them. I believe that, without question, Ricky Gates bears great responsibility, but he was not alone. In a very real way, the managers of the railway who allowed Gates to be at the controls of that train are

responsible. Similarly, fellow workers are responsible because they failed to make efforts to prevent Gates from taking an ill-prepared and inadequately tested locomotive out on the Northeast Corridor tracks. The people who designed and approved for manufacture and use the unsafe passenger car in which T.C. died are responsible, and on and on.

In a very real sense, we are all responsible, all of us adults. I feel some responsibility, too. You see, we had a warning and we ignored it. In August of 1985 T.C. was aboard an Amtrak train traveling from Chicago to Harrisburg. Near Mansfield, Ohio, in the middle of the night, his train collided with a truck and derailed. T.C. was not hurt. Susan and I were just so grateful to have him home and safe that we ignored the warning.

Of course, we had no idea that train wrecks were such common occurrences and that train crews were as often drug and alcohol impaired as they are. We assumed that the wreck was an anomaly. I remember saying to T.C. that now he had a good story to tell his grandchildren, of the time he was in a train wreck. What an adventure.

We did not even realize that it was a warning, and now, of course, T.C. will not tell his grandchildren anything. Neither will we.

Those are absolutely inescapable facts. And it is some additional absolutely inescapable facts that I would like to speak to here today.

Mr. Riley will supply you with pages of figures, statistics, numbers which make it inescapably clear that Ricky Gages and Edward Cromwell are not the only drug and alcohol users directly responsible for the safety of themselves, their fellow workers, passengers, and people who live and work near railroad tracks. It is a fact that an excellent piece of legislation was produced by this committee in April of 1987 which, if it becomes law and is enforced, will undoubtedly significantly reduce the number of drug and alcohol impaired safety-responsible transportation workers.

Notice the "if." Some people in rail unions, in the industry and in the Congress have resisted and impeded progress. Significant resistance to this absolutely necessary drug and alcohol testing program has come from the rail unions. In some cases the resistance has been in the hands of union leadership, in others, from the members themselves.

The RLEA, the UTU and BLE spokesmen have repeatedly and vigorously urged that Operation Redblock is a viable and growing alternative to regulation. But rail unions have not supported Operation Redblock in good faith. Hugh "Bud" Dogherty, a Baltimore local representative, the representative of the United Transportation Union, was present when the January 4, 1987 Conrail crew members told investigators for the NTSB that they had not used drugs on the train. He failed to mention to anyone that he knew they were not telling the truth, that Edward Cromwell told him shortly after the crash that drugs were used while driving the train.

My wife has spoken on the telephone with men who identified themselves as railroad men who were sympathetic and supportive of our efforts, and encouraged us to continue with our struggle, but told her that they were unwilling to be known because, they said, they were fearful for their safety.

One of our local television reporters attempted to interview rail employees on the day that the Ninth U.S. District Court of Appeals handed down its decision on post-accident drug and alcohol testing. In several cases, as he was about to interview railroad employees, they were coerced into withdrawing by other employees as he watched. In all but one case, the threats succeeded.

People at this table have been threatened by unidentified persons. These scare tactics are also inescapable facts.

The railroad companies have repeatedly insisted that although they recognize that drugs and alcohol represent a significant safety problem, the testing programs they have in place are sufficient. They often cite Operation Redblock as an example of an effective deterrent and rehabilitation program.

Even if Operation Redblock worked as intended, it still would not effectively reduce the dangers. A person does not become addicted to drugs and alcohol overnight. It takes time. Between the time the addiction begins and the time the addict or his fellow workers decide that it has gone on long enough, significant damage could have been done. There will have been many work days during which the addict is functioning while impaired.

And look what happens when an employee tries to use the reporting procedure. James Raynor has filed a $4 million lawsuit against CSX Corporation claiming railroad officials demoted him for whistleblowing about unsafe train operations. Last summer he learned that an engineer had been reporting to work under the influence of alcohol. When his reports went unheeded by supervisors, he went to Florida to personally report the incidents to CSX President Ronald Drucker. Mr. Raynor claims that neither Mr. Drucker nor other CSX officials would speak with him. His position as a railroad foreman was terminated in July 1987, Mr. Raynor was assigned to the Youngstown, Ohio area as an engineer, and claims that the demotion caused him to lose benefits, early retirement and pension.

The railroads seem willing to live with a program which relies heavily on requiring tests when there is reasonable suspicion of intoxication or impairment. In a statement to the NTSB, a railroad safety engineer with 20 years of seniority, testified that he had never once pulled an employee from a job assignment because he suspected intoxication or impairment. This in spite of the fact that he spends 80 percent of his work hours in the field observing employees. Testing on the basis of observation of behavior has not worked. These are facts, inescapable facts.

Certain Members of Congress have thrown up smokescreens of objections. Some have said that a program of drug testing infringes on the safety responsible rail workers' rights to privacy. The closest they manage to come to making an effective case is when they say that the drug tests measure not only ingestion during work hours, but also during nonwork hours. They insist that what an employee does on his own time is his own private business.

In general, I agree with that point of view, but there are several inescapable facts which mitigate the general principle. We have read two published reports of scientific studies which were done on the effects of marijuana ingestion. The experiments established that the effects of marijuana continue to significantly affect performance of complex tasks at least as long as 24 hours after ingestion. Therefore, a test which can discover drug ingestion long after the fact is beneficial.

Many employees, many rail employees who perform safety critical jobs are on what is called the extras list. Gates and Cromwell were working from the extras list. So was Tom Connors, the Amtrak switchman who routed the Amtrak Night owl on a track occupied by a maintenance vehicle, causing a derailment in which 25 passengers were injured. Employees on the extras list are called to work assignments with as little as two hours notice. For example, two hours was the notice provided to Gates and Cromwell on January 4, 1987.

Common sense dictates that it is entirely appropriate that a drug and alcohol testing program can only be effective if it is capable of monitoring the employees' behavior during the hours preceding his work assignment.

Another argument which has been heard from certain Members of Congress is that the testing facilities in this country are incapable of handling the volume, and that the tests are insufficiently reliable. An inescapable fact is that not only are there already a large number of commercial laboratories in this country, the number is growing steadily.

In our home area, for example, the Harrisburg Hospital just last summer added a drug testing facility. American capitalism will answer the need.

Perhaps 5 percent of the screening test positives are false. The significant inescapable fact is, however, that all positive test samples are submitted for verification to a second, more sensitive test which is 100 percent accurate.

Every day we encounter new technologies which enhance our safety and well being. In some cases the uses of the technology could, if we wanted to look at them in that particular way, be thought of as unreasonable infringements of our rights of privacy. For example, technology has provided our highway patrols with radar speed checking devices. These machines are used in what amounts to a random manner to deter and detect speed law violators. How absurd it would be if we required our highway patrols to announce and specify dates and times and locations of speed checks. Habitual speeders would be neither detected nor deterred.

Contemporary technology has provided us with an effective and accurate tool to detect and deter alcohol and drug users among safety responsible transportation workers. How absurd it is to only use the tool in a manner which all but cripples its effectiveness.

Any drug and alcohol testing program which does not include random testing is crippled. Restricting the use of this significant tool to any sort of preannounced schedule is simply absurd.

Those who are obstructing the progress of H.R. 3051 have the easiest job in the world. All they have to do is sit down, fold their arms and say no. They do not have to listen to reason, they do not have to consider evidence, they do not even have to be polite; all they have to do is say no. Such irresponsible, childish behavior might be acceptable from a three year old, but it is a disgrace when it comes from men in positions of responsibility who are supposed to be leaders and defenders.

I have tremendous respect for the gentlemen on this committee who have so responsibly, courageously and persistently fought for an effective program of drug and alcohol testing for safety responsible transportation employees. You gentlemen have our deepest gratitude and admiration.

But this leads me to my last inescapable fact, the fact that the reasonable adult behavior of a few good men should be remarkable. Responsible adult behavior by adults should be the norm, not the exception, but it is not. If it were, we would not be here today, and our children would be alive and well.

The CHAIRMAN. Thank you, Dr. Colley.

Mr. Johnson?

STATEMENT OF ARTHUR JOHNSON, ON BEHALF OF SAFE TRAVEL AMERICA

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I appreciate very much this opportunity to inform the committee, again, of my views on the critical issues before you today, namely, certain aspects of transportation safety, including testing for drugs and alcohol of persons employed in safety sensitive positions.

My name is Arthur Johnson. Our lovely 20-year old daughter Christy was one of the 16 killed in the needless Amtrak-Conrail crash at Chase, MD on January 4 a year ago.

Since that tragedy, many families and friends of victims have formed a grass roots volunteer group called Safe Travel America, which I represent here today. That group is devoted to improvement of the fragile transportation system that we have discovered to our horror exists in this country.

It is now nearly 14 months since those 16 precious, innocent people were killed, victims of a violent collision that should never have occurred, and which was definitely preventable. It happened because of the reckless and negligent performance of crew, negligent because of neglect of simple rules of the road, and reckless because of the use of illegal drugs.

I cannot and do not fault the legislative efforts of this committee because you led the way by passing potentially good legislation on both the safety and testing issues last year, for which we and the nation are grateful. But I can fault the system which continues to keep both of those laws tied up in, or waiting for, conference and ultimate definitive action.

We will soon hear Mr. Riley present some new and devastating statistics about railroad accidents and the frightening frequency of testing positive for drugs and/or alcohol of responsible members of the crews. The accidents continue to happen with alarming frequency, head-on collisions, derailments, fatalities and injuries on passenger, freight and commuter lines. Fortunately, nothing has been as serious as Chase, yet, but do we have to wait for another Chase before we see definitive action?

The stonewalling of efforts to complete the legislative process comes from special interest groups which ought to be as concerned about safety as we are. Perhaps if their family members had died at Chase, they would be. Yet, they continue to throw in flimsy constitutional arguments about testing being an invasion of privacy. Recently they were able to get a split decision on the testing issue from the Ninth Circuit Court of Appeals in San Francisco, rendering invalid the NRA regulation on post-accident testing for drugs and alcohol.

There is much deserved public outcry, editorial and personal, about that decision. The Supreme Court requires that the benefits of an issue be weighed. We believe that safety of life far outweighs the minimal inconveniences of testing. Five other appellate courts have upheld testing programs for various types of employees. If the Third Circuit protects the betting public by authorizing testing of jockeys, what can the rationale be for not testing rail employees responsible for the safety of thousands of lives, including their own?

This extraordinary decision by the Ninth Circuit must be overturned on appeal, and quickly, because fatal accidents continue to happen.

Opponents of testing also try repeatedly to discredit testing programs because of some unfortunate mistakes that may have occurred. I believe that it has been adequately demonstrated that a properly managed program can protect the rights of the individual, and that essentially foolproof results can be obtained by requiring second tests of positive samples using more sophisticated, precise and demonstrably definitive techniques.

Strong testing requirements must be established for those persons employed in safety sensitive positions. A provision for mandatory random testing must be included in the eventual legislation because it provides by far the strongest deterrent to drug and alcohol use by people in those positions.

Mr. Chairman, we are a panel of angry, grieving parents who speak for other families and friends as well. Many of them have spoken to me in the last few days, but can for logistical reasons not be here to share this opportunity with us. We do have in the audience, in addition to those of us at th table, Mr. Case, who is the brother-in-law of James Michael Clay who was killed in the tragedy. Denise Evans, the wife of the Amtrak engineer who was killed was planning to be here. Her son is still suffering and in therapeutic care, and she was unable to be here because of the continuing tragedy that affects her family.

Also present in the audience is a group of concerned citizens from Chase, MD, people who worked hard to assist at the time of the tragedy, who see Amtrak and Conrail in their back yards many times

daily, people who are incensed at the minimal penalty to be given to the engineer who has confessed his guilt, incensed at the strange decision of the Ninth Circuit, and incensed at the inaction by the Congress on legislation that would improve safety and provide a necessary deterrent to the use of drugs and alcohol by crew members.

They are particularly disturbed by union opposition such as the reported withholding of information on drug use by the guilty crew, this information withheld by union representatives.

It would be refreshing indeed if those opposing the proposed solutions which this committee has put forward would acknowledge the serious safety problems that exist as well as the direct involvement of crew members in those problems. The leaders of the opposition, if they faced the facts squarely and honestly, could then join us in the crusade for improvement, remove the roadblocks to progress, and gain the gratitude of their members and the traveling public for contributing to public transportation safety.

I fervently await their awaking to the fact that they could help rather than hinder.

Mr. Chairman, I hope very deeply that the Congress, with your leadership and the leadership of this committee, will move forward promptly to pass the needed legislation on both the safety and testing issues. This session of the Congress will be short; we need priority attention on these issues now so that many more months will not pass without specific action.

Mr. Chairman, immediately after this hearing, Safe Travel America intends to hold a press conference in this room. We, and hopefully you, will be available not only to make further statements, but also to respond to the testimony which follows us and which we have not yet heard.

Thank you, MR. Chairman.

The CHAIRMAN. Thank you, Mr. Johnson.

Dr. Horn.

STATEMENT OF DR. ROGER HORN, ON BEHALF OF SAFE TRAVEL AMERICA

Dr. HORN. Mr. Chairman and members of the committee, it is always a privilege to be permitted to testify before you, but I must tell you in all honesty that I have very mixed feelings about being here again today. As an academic, I am accustomed to an environment in which the person with the soundest logic and the best data wins the debate and takes home the medal and gets the raise.

But we have learned to our dismay that that is not always the way things work in Washington. Despite the clear need for reform in the way the Federal Government regulates rail safety and the way we deal with the scourge of substance abuse by safety critical transportation employees, here we are, almost 14 months since the tragedy in Chase on Sunday afternoon, January 4, 1987, and not one line of reform legislation has yet been signed into law. So far, the power of selfish special interests has prevailed against both logic and data.

83-232 0 - 88 - 2

We are frustrated, Mr. Chairman, and I gather from your remarks that you may be, too. But it seems churlish to complain to you since we have no quarrel with you and your colleagues in the Senate. You have already produced two fine bills on rail safety and drug abuse, and the problem now seems to be not here but with the leadership of the House Committee on Energy and Commerce and its Subcommittee on Transportation, Tourism and Hazardous Materials. We are dismayed that they have not yet begun to conference the rail portion of the substance abuse bill, and that there are reports of efforts under way to strip the rail safety bill of its most important elements, namely, employee jurisdiction for the FRA and enhanced penalty levels against the carriers.

We urge you and your colleagues on the Senate side of the conference committee to hold firm against all efforts to dilute these vital bills. And if our voices can be heard on the other side from here, we urge your House counterparts to begin immediately to conference these bills in good faith.

We urge you not to be distracted by the siren calls of those who would not have these important new protections be offered to the public.

There are three distractions that I would like to mention. We have heard these time and time again, and we may yet hear them today.

The first is to point with alarm at potential errors in the testing system and the potential for the misidentification of an abuser. We are the first to admit that errors and maladministration can occur in a testing program. They occasionally occur in other programs, perhaps from time to time in my own university, maybe even in the administration of a union, but probably not in the administration of the Senate. But this is not a reason not to test; but rather, it is a reason to insist on meaningful certification of laboratories, as is provided for in S. 1041 which this committee has passed. It is an important new provision, and it should be pointed to with pride as something that has been stalled as this bill has not yet become law.

The second distraction is the assertion that positive testing for drugs proves only some prior use, that it does not prove impairment on the job, and that it seems difficult to establish an unassailable, causal relationship between drug use and actual impairment on the job.

But not everything in life is perfectly certain, and not all relationships that we come to believe in can be proved with the certainty of a mathematical theorem. The same is true, of course, between the connection between cigarette smoking and lung cancer and other health risks. But this has not kept the Federal Government from taking important steps to alert the public to the danger.

So it must be with drugs and safety critical employees. Let us not let the lack of a complete, logical and causal chain here deter us from taking action about what everybody knows, that there is a connection between drug abuse and inattention and danger in the work place.

The third distraction is the cry to give us more time for voluntary action rather than passing new, restrictive laws. There are too many laws already, people say. If laws could solve our problems, why, surely one glance at the Congressional Record would indicate that we must have no problems left. But there have been 13 months since the first hearings on this matter, and what has happened? There has been more than a year for voluntary action, but very little has happened.

We know that the carriers are still ignoring horrendously bad driving records on the part of their employees. We have personal knowledge in Baltimore County of a Conrail freight conductor whose driving record contains 24 convictions for traffic offenses, serious traffic offenses, including multiple drunk driving convictions, for which he was convicted again only two months ago. Nevertheless, he is still in charge of trains. He is still an important safety link in the system, and the carriers do not seem to be interested in detecting such people or dealing with the problems that these bad records may indicate.

So much for voluntarism. We are disgusted with the results of a year's effort at voluntarism. The public says enough. Let's get on with solving the problem.

Now, we do not want to lose focus on the undone business of these two important bills that you have already passed, but please let us take a moment, and permit us to mention that there is other safety business that has not yet been started, and we hope the Commerce Committee can soon begin hearings to develop yet more legislation in other areas, of which I would like to remind you of two that I have testified on about three previous occasions.

The first is the matter of the Federal Anti-Drug Abuse Act of 1986, Subtitle T, Chapter 17a. The present language prohibits operation of a common carrier while under the influence of alcohol or drugs, a worthy objective. The law provides a presumptive quantitative blood alcohol level for impairment, but unfortunately, it sets no similar quantitative standard for drugs, probably because there is no quantitative standard that one could decide on with any certainty. The law refers only to detection of levels sufficient to impair, and thereby invites a court battle of expert opinion.

The U.S. Attorney in Baltimore has told us that no one has ever been charged under this law, and that to the best of his knowledge, no one is ever likely to be convicted for drug use under this statute. I am sure that is not what the Congress had in mind when it wrote the law.

The law should be amended to provide that any level of illegal drugs in blood or urine above trace amounts shall be presumptive evidence of impairment. Many illegal drugs have longlasting effects on judgment and perception, and there should be no place in the public transportation cab or cockpit for anyone who uses illegal drugs at any time in any quantity.

The second thing is an item that I have testified about before, but it has been made painfully clearer by the events of last Tuesday in Baltimore County's Courthouse. New criminal penalties are needed to encourage careful and continuous observance of safety rules by

managers and employees. After the Chase tragedy, we found that there was no Federal statute with which to charge a drug smoking train crew who ran their safety sabotaged engines into the path of a passenger train, killed 16 people, and did tens of millions of dollars of damage. There was also no Federal statute with which to charge their supervisors and managers who failed repeatedly to follow company and FRA rules on inspection and maintenance of safety equipment. Only trivial administrative monetary penalties against the companies were available.

The only criminal statute available was a Maryland misdemeanor manslaughter law originally intended to deal with drunken automobile drivers, and under this law, only one man, the engineer, could be charged with anything at all. He is not the only guilty party, but it appears that he will be the only person convicted.

Although the administrative penalties possible under the new FRA jurisdiction provided in S. 1539 are the best route to handle the vast majority of safety infractions, there should be some level of violation that would incur severe criminal penalties, for otherwise, there may not be sufficient incentives for managers to take the sometimes costly steps necessary to assure safety.

It is incongruous that railroad executives face criminal sanctions, personal criminal sanctions, for price fixing and other antitrust activities, but they face only relatively small fines for killing innocent passengers or employees as a result of calculated business decisions to cut corners on safety.

We urge the committee to give careful consideration to criminal penalties for employees and managers who willfully engage in especially egregious contraventions of safety rules, who repeatedly ignore other penalties, or whose willful violation of safety rules results in serious injury or death to passengers, employees or wayside citizens.

Let us never again face the ludicrous situation in which the interstate traveling public has to rely on a county prosecutor to use an inadequate state automobile misdemeanor statute to deal with the catastrophic consequences of a crash in the federally regulated rail industry.

The members of Safe Travel America stand ready to work with you, Mr. Chairman, and your colleagues, to develop new legislation in these and other areas to protect the traveling public. We hope you will let us know if we can be helpful.

The CHAIRMAN. All three of you have been extremely helpful. I do not know that there could be any silver lining to the Chase tragedy, but if there were one it is that the loved ones had parents who had the intellect and judgment and persistence and, in a way, the brilliance to objectively study and correlate and present this problem.

I do not know of any better statements or more objective approaches to a real problem. And it is now the negligence and reckless performance, or lack of performance I should say, of us in the Congress.

Unfortunately, we play a game up here of no pain. We are not supposed to accomplish anything. We are just supposed to save every segment of society from pain. And as a result, we do not pass anything. We just give you a hearing, and you are supposed to go back home and be happy because you got a hearing.

We are not to pass a law, because that would make the labor unions unhappy. So no law is passed. They are kept happy. There is no pain there.

And we put out program after program, but of course we do not pay for it, because that would cause pain.

It is the sorriest operation I have ever been associated with in 40 years of public service. But I appreciate your presentation. There is no need for cross-examination or whatever.

Our colleagues Senator Wilson and Senator Exon, have statements that they wish to present at this time. And then we will go to further questions.

Senator Wilson.

OPENING STATEMENT BY SENATOR WILSON

Senator WILSON. Thank you, Mr. Chairman. And I will echo your comment about the presentations that we have heard from this panel of witnesses. I have mixed feelings. The only reservation that I could possibly express is that the outrage they have expressed and the sorrow I think they have, frankly, expressed with remarkable restraint.

I would say I do not think I have heard more impressive testimony from a panel of so-called lay witnesses since I have been in this Congress. Any statement that I might make I think would pale in insignificance by comparison.

But I will say, in response to what they have said, that I think that the Ninth Circuit Court of Appeals has made a tragic error in its ruling. But it is not perhaps their fault, as the testimony has indicated. It is up to us to cure that.

I think that to argue that there is a Fourth Amendment right on the part of those who hold the lives of passengers in their hands to refuse to undergo drug testing is to say that they have a right to engage in substance abuse worry-free which is paramount to the right of their passengers to travel in safety.

And I think that is inexpressible nonsense and outrageous nonsense. And the only excuse for permitting that situation to continue is exactly the situation that the Chairman has described. It is political pressure of an organized and very strong special interest group.

That is no excuse. It is an explanation for a deplorable situation.

So Mr. Chairman, I would say that, as courteously as is possible under the circumstances, that we should urge the conferees on the Air Passenger Protection Act legislation in the other house to do what is right, and obviously so. And I would, I suppose, engage in the needless urging of our own conferees to stand firm.

I know I do not have to do that in the case of you and Senator Danforth. But this is such a clear and compelling case, it is difficult for anyone to understand why it should be necessary for these gentlemen to have traveled here and to have rendered the eloquent testimony they have today.

The CHAIRMAN. Thank you.
Senator Exon.

OPENING STATEMENT BY SENATOR EXON

Senator EXON. Mr. Chairman, thank you very much. I am going to be very brief in my opening statement.

Since I have been intimately involved in this, I want to join my colleagues in thanking you for the excellent, excellent testimony that you outlined here this morning. And maybe this and the press conference that is going to follow will set off a bombshell to correct what may be some misapprehensions in the public, and certainly in certain parts of our judiciary, as to the magnitude of the problem that faces us.

First, I want to thank you, Chairman Hollings, for holding this hearing today on developments in the drug and alcohol testing programs, or lack thereof. We have a mutual interest in this. I was prepared to convene the Surface Transportation subcommittee on this issue if the full committee had not scheduled this hearing on drug and alcohol testing.

But I want to thank the Chairman. This is such a vital issue and it is proper indeed that it be brought to the full committee.

The problems in transportation safety are not primarily caused by a lack of technology or defective equipment, even though there is a need to improve in these areas as well. But the major problems today arise from the simple fact that all our modern high tech equipment must ultimately be run by people, and unfortunately people make mistakes.

I am very concerned about what seems like an increase in accidents due to human error or outright negligence. Some of these issues are being addressed in the rail safety bill which originated in the Surface Transportation subcommittee and is now in conference with the House. And I noted with great interest the not so gentle nudging that came out of your testimony here this morning: Let us get on with the program.

We address a number of human issues in the rail safety area, such as allowing the Federal Railroad Administration to directly sanction individuals, either management or labor, who intentionally tamper with safety devices. We also take the first step toward ensuring minimum qualifications of train engineers. And we also ensure that information about individuals with records of alcohol and drug-related abuse, such as the records you have specifically testified about this morning, can be used in identifying the problems that exist and how we are going to cure them.

The important area of drug and alcohol testing remains. Unfortunately, drugs and alcohol are serious, serious, serious problems in our society, whether some of the courts in this land recognize that or not.

Drug and alcohol abuse appear in all occupations. Transportation workers are no different from the rest of society. But their jobs affect the safety of many lives each and every day.

Last year the Senate approved legislation to begin random drug testing, and I authored the amendment to add truck and bus drivers to these requirements.

I hope the House or Representatives agrees with the Senate and also approves random drug testing.

I also serve on the Senate Armed Services Committee. You will recall that there used to be extensive publicity about drug problems in the military. That does not happen anymore because the Armed Services went to random drug testing. Since then drug usage dropped dramatically. As someone who tends to look beyond theory to what actually works, random testing does work to lower drug and alcohol use on the job.

There are concerns about the fairness and accuracy of random testing and I understand those concerns. However, I believe those concerns were addressed by the amendments I and others offered, which were adopted, to ensure that random testing be impartial and fair to employees.

I would just summarize by saying that this drug problem is so widespread in our society today and many of us who have not experienced it do not begin to understand the problem that is out there right now.

On the way down this morning, I heard a news report that there was an all-out war going to break out in southern California because there is an excess of certain drugs and there is no way to dispose of it, and there is going to be an awful lot of people killed in that process.

I would hope that the Ninth Circuit and other courts so situated would get into the real world today. I would only say that I do not think that my interpretation of that Ninth Circuit Court decision had anything to do with the laws that we have or have not passed, and we should pass some. I think they were talking about the Constitution itself and, as we all know, we are not going to change the Constitution by laws.

I would hope that that would be appealed immediately on up to the Supreme Court, because all that I can say is all of us in society, regardless of our station in life, have got to recognize that we have got to give up maybe some of our individual rights if we are going to protect society from this menace of drug and alcohol abuse that obviously, from accident after accident, can be traced in whole or in part to the misuse of these substances.

It is a major problem. And I thank you, Mr. Chairman for calling this hearing which, if for nothing else, may focus attention so that we can get something done.

The CHAIRMAN. Thank you.

Senator Danforth.

Senator DANFORTH. Mr. Chairman, last Saturday I was in Poplar Bluff, Missouri, and while I was there I was told of a medical doctor who had as a patient a commercial airline pilot, active commercial airline pilot, whom the doctor is treating for a cocaine addiction. Because of the patient-client relationship, the doctor is prohibited from disclosing the identity of the airline pilot who is on cocaine.

We have heard allegations that union officials, knowing that their members have used drugs, have covered that up. That leads me to believe that if we do not have mandatory random testing of transportation employees, people just are not going to come forward voluntarily and say: Hey, Joe is on drugs.

I see in Dr. Colley's statement that there have been instances where there have been threats: Do not tell on so-and-so or you will be threatened.

Would you agree that without mandatory random testing we are not going to have people come forward and blow the whistle on those who are on drugs?

Dr. HORN. Our experience indicates that you are quite right, absolutely true.

Senator DANFORTH. Now, gentlemen, let me just say one thing to you. I know that this seems very frustrating to you. You have been here a year. It is frustrating to me. We have been working on this, trying to get this passed by Congress.

I am going to tell you why it is not being passed, why it is in conference. It is called politics. It is called politics.

Mandatory random testing is opposed by the unions. The unions are against you. You and the unions are in conflict on this legislation. The unions have political power. They have political clout.

This is a battle of political power between you and the transportation unions. You are not going to win this battle in an instant. You are only going to win it by sticking to it and by building this sense of rage throughout this country.

You have to fan the flames of rage. You have to make it clear, day in and day out, that it is absolutely outrageous to have the alleged right of a safety-related transportation employee not to give a urine sample. That is the alleged right, the constitutional right alleged, not to give a urine sample.

You have to fan the flames of rage that says that that is just not right, that the right to give a urine sample takes precedence over the lives of people like your kids. Now, this has to be built throughout this country, because otherwise the political pressures, the organized interest groups, the transportation unions, are going to win the day. They are going to win the day unless your voice is louder than theirs and unless you can build a reaction throughout this country of just good, decent citizens who say this is wrong, this is just absolutely wrong, and it is ridiculous and it has to be stopped.

You may not win it this year. You may not win it this year. It may take next year or the year after or the year after. But if you stick to it and if you are insistent and if you continue to let your rage show and react with the people in this country, I am convinced that some day you are going to win this issue.

I appreciate your being here, and I urge you never to let up until this is enacted into law.

Senator EXON. Mr. Chairman, I just feel compelled to add something to what Senator Danforth just said. He may be indicating somewhat of an overstatement.

I have had my clashes with the leadership of the railroad unions that I have known and been a friend of for a long, long time. The members of this committee know that I come out of a family that is heavily involved in railroaders and railroad unions, and so I just do not want to let it go by that the only problem is railroad unions.

I suggest, though, that politics does not control the Ninth Circuit Court of Appeals. And I suggest that the labor unions do not control the Ninth Circuit Court of Appeals.

Many union individuals have come to me and said: We agree with you completely, Senator Exon, on your efforts to test us, and I have no reason to be against that.

So I just want to say, while we have had some trouble with the railroad unions, I do not think that we can say they are the only problem. And right or wrong, the Ninth Circuit Court of Appeals—I think they were wrong—decided the case that fostered this hearing today, they indicated there were some problems.

Let us work out the problems. I just want to emphasize again that I do agree completely with my friend from Missouri. The fact is that unless we can have some type of uniform mandatory drug testing on a fair basis, on both railroad management and railroad labor, we are never going to solve this problem that is rampant in the transportation industry today.

The CHAIRMAN. Well, thank you.

I agree with Senator Danforth. He has put his finger on the problem.

I would amend the motion, Jack, to say that there are two targets. It is not just our friends here at the table in the union. It is us here, and it is up to us to stir up and bring and sell their consciences over on the House side, because we can do it and we can do it this year.

If we can sit around and start arresting everybody in the middle of the night over campaign financing, I think we can get just as stirred over public safety. And it is the priorities we as a group set, where these people at the table would have no influence whatsoever.

It is up to us, and I think we are off to another good start here this morning.

Let me try to move on, and thank all three of you very, very much, because I want to hear from Mr. Riley and the other witnesses here. Thank you very much.

Mr. Riley, you seem to be a very popular witness here in Washington this week. We welcome to the committee Mr. John Riley, the Administrator of the Federal Railroad Administration.

And Mr. Riley, we have your statement. You can deliver it in full or summarize it, as you wish. We do not want to leave anything out, and the emphasis is yours.

STATEMENT OF HON. JOHN H. RILEY, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION; ACCOMPANIED BY GRADY C. COTHEN, JR.

Mr. RILEY. Thank you.

I have just come from a hearing in the House on Amtrak funding. I am not sure that one could describe that experience as popular.

But I think this is a terribly important issue this morning. It is fitting, in a way, to come up to this podium after Roger Horn and Arthur Johnson and the families, because two weeks ago I was sitting in my office with Roger Horn talking about what a difficult year this year has been for all of us when the telephone rang, and it was the notice that the Ninth Circuit had just overturned the lower court's decision and overturned our alcohol and drug testing rule.

I think it discouraged us in the short run, but in a way it also recharged our energies. We clearly have miles to go before we sleep on these issues. And I really commend the committee for what it is doing this morning to keep these issues in the public eye.

I celebrated my fortieth birthday a year ago in a Senate hearing room, just a few days after the Chase accident. We talked at length about drug use, about tampered safety whistles, and about some children who will never have a chance to have a fortieth birthday because of them.

Two issues dominated those hearings: drug use and an archaic loophole in the Federal safety laws that prevents my agency from having any jurisdiction over railroad operating employees.

And in those days after the Chase accident it seemed so certain that legislation strengthening our jurisdiction was near at hand. Now we meet today in another Senate hearing room, 14 months later. While we have made some progress and there are bills in conference, the reality is that not one of the legislative proposals introduced in the wake of the Chase accident has become law, even 14 months later.

And the tragedies of January 1988 bear a sorry similarity to the tragedies of January one year ago. Once again, an experienced engineer has run through signals and lives have been lost. A tower operator fled the scene of an accident and went underground for four days.

And Federal authorities could not do anything about it because we still lack jurisdiction over railroad operating employees.

Once again, the drug tests are positive. They are positive for Amtrak personnel at Chester. They are positive for Conrail personnel at Harrisburg. They are positive in Wyoming.

Over the past 13 months, we have experienced 41 accidents in which one or more employees have tested positive for alcohol or illegal drugs. 29 people died in those accidents. 341 innocent people were injured. Property damage alone exceeded $28 million. All of that since we last met in January.

In 1987, the percentage of employees who failed post-accident drug tests went up by about a third, from 3.7 percent to 5.1 percent. And since the inception of our drug testing program, we have not ex-

perienced a single month in which more employees tested positive in post-accident drug tests than January 1988, which may also be the last month of our post-accident testing program.

Mr. Chairman, drug use is not a problem unique to the railroad industry. It is a societal problem. It affects railroaders because we are part of society. But what is unique is the extent to which the safety of passengers, employees, and even nearby residents is endangered when drug use permeates the workplace.

Any debate on the complex issue of drug testing should start from a simple premise: that the ability to operate a train laden with passengers and hazardous materials is a privilege, it is not a right; and it is entirely proper for society to condition that privilege on a reasonable assurance that the operator is drug-free.

Through our licensing rules, through our annual physical requirements, society accepts the proposition that pilots, truck drivers, and engineers ought to be required to establish that they are adequately trained and physically capable of doing their jobs.

An impaired engineer is at least as dangerous as an untrained or unhealthy one. Why should the responsibility to prove that one is drug-free be treated any differently?

Now, the assurance demanded by the FRA testing program is reasonable by any reasonable standard. Samples are drawn in independent medical facilities. All tests are performed in a single laboratory, so quality control can be monitored. Any samples testing positive are frozen and preserved, so the employee can demand a retest if he chooses to do so.

Most important—and I mean this. Most important, mandatory testing is only one component of a comprehensive program designed both to protect the public and to help the troubled employee.

That program includes FRA sponsorship of a national counseling, prevention, and peer intervention program called Operation Red Block. It also incorporates a "bypass" program under which any employee who voluntarily seeks assistance can bypass discipline, participate in a rehabilitation program, and reclaim his job with no loss in seniority.

Only the employee who foregoes those opportunities and brings drugs into the workplace has to fear discipline. But the public should expect no less and the employee who places himself in that position has no one to blame but himself.

The recent decision of the Ninth Circuit Court of Appeals, if it is sustained, will effectively end the testing component of that program. I want to tell the committee that as we are sitting here we are filing our motion for a stay in the Ninth Circuit, to try to keep the rule in effect while we appeal to the Supreme Court.

The kind of "particularized reasonable cause" required by that decision is rarely available in the railroad operating environment. Under that kind of a "smoking gun" standard, it is very unlikely that we could have tested any of the crew members at Chase or the run-away tower operator at Chester, PA.

Now, I share Jim Burnley's optimism that the FRA rule ultimately will be sustained on appeal. But it would be a mistake to assume that FRA's current reasonable testing rule by itself will ever be sufficient to produce the drug-free workplace that we are all committed to.

Reasonable cause testing has unquestionably had a positive impact in reducing substance abuse in the railroad workplace. But in my experience over the two years of reasonable cause testing, I have learned both the strengths and the limitations of that program.

The impact of reasonable suspicion testing is keyed to a supervisor's ability to detect symptoms. There are many drugs which can impair the spacial perception of an employee to the point where he cannot safely operate that train and yet would not give symptoms recognizable to even a trained layman.

More serious is the problem that the employees who use such drugs believe that they will not exhibit observable symptoms, so reasonable cause testing does not have the same deterrence in the workplace that we are going to need to create a drug-free workplace.

Finally, the rule can be circumvented by procedures as simple as reporting for work unimpaired and then consuming drugs in the locomotive cab, and that appears to be exactly what happened at Chase, MD. If you show up clean when you are eyeballed by your supervisor and then take drugs in the workplace, you have beaten the rule.

Test results over the first two years of our post-accident testing program have disclosed that an average of 4.4 percent of all employees involved in railroad accidents had recently used illicit drugs, and about another seven-tenths of a percent had used alcohol.

Although this is clearly an improvement over the data compiled in pre-testing years, it still represents a hard core of drug users who have not been persuaded by prevention campaigns, who have not been willing to take advantage of employee assistance programs, who have avoided detection in their annual physicals, and who have not been deterred by reasonable cause testing.

We continue to find positive test results even from those railroads that have effective voluntary programs with union participation, which just illustrates that people are different and different people respond to different stimulus.

Voluntary programs alone are no more capable of producing a drug-free environment than testing alone is capable of producing a drug-free environment. They have to go together. They do different things. They complement each other.

I am convinced, Mr. Chairman, that if we are going to have a drug-free environment in the railroad workplace, we have got to supplement the existing, at least existing today, reasonable cause program with a random testing program for railroad operating employees.

Random testing is not dependent on supervisor observations and the users know that. It has a deterrent value that cannot be duplicated by any other form of testing. It cannot be defeated by on-duty consumption, and because those chosen for testing are picked from a statistically random number table, it provides employees with the best guarantee against discriminatory testing.

Now, Mr. Chairman, I am confident that FRA has the authority to mandate random testing and we are committed to doing so. But as the events of the last few years have illustrated, any random testing rule is certain to be litigated on both administrative and constitutional grounds.

The Congress can materially assist us on the administrative side of that litigation by clarifying what we believe to be the case, that the Federal Railroad Safety Act of 1970 authorizes the issuance of a random testing mandate. But we think we can prevail on that issue. We are confident we can prevail on it.

We would certainly prevail far more quickly if such legislation became law. Litigation means delay, and the cost of delay is measured in human lives.

Now, before I turn this back to the committee for questions, it is essential to stress that there is a second and equally important issue now before the Congress. Because without enforcement jurisdiction over individuals, management and labor in the railroad workplace. FRA is powerless to suspend the operating privilege of an employee even if we catch him with drugs in the workplace, even if we catch him redhanded tampering with a safety device, as we have done in the past year.

The FRA, as far as I know, is the only Federal safety agency whose enforcement jurisdiction extends only to corporations. We have no enforcement authority over railroad operating employees.

Now, from a public policy perspective it is impossible to defend a system that gives the primary Federal safety agency jurisdiction over everybody but the people who actually run the trains. That system ignores the fact that safety is a shared responsibility between management and labor, between individuals and amorphous corporate institutions, and any program that covers only half that equation can never be more than half effective.

Now, this is not—and I really have to stress. It is not, as some opponents argue, an anti-labor proposal. Present laws hold railroad companies accountable for their safety performance. The individuals who operate the trains ought to be subject to the same public accountability as their counterparts in aviation and other modes of transportation already are.

Human performance is certainly not the only cause of injuries in the railroad environment, not by any means. But the accidents of the last five weeks have demonstrated very dramatically that hazards to employees—and 90 percent of the people killed in these accidents are employees—and hazards to the public can arise just as easily from the conduct of operating employees as from the actions of railroad companies.

Accountability for compliance with Federal safety standards must extend beyond the corporate entity to the individuals who actually run the railroads, both in management and in labor, as it does in the FAA and under existing hazardous materials statutes. If it does not, safety regulations directed at human performance will have no more deterrent value in January 1989, than they had in January 1987 or January 1988.

Where we have the power to regulate, FRA has been able to produce dramatic improvements in accident ratios. Accidents due to track, signal, and equipment failure have been reduced more than 75 percent in this decade. I do not think there is any other field of transportation that can cite a record close to that.

Even with the Chase accident, the railroad accident rate last year was the lowest ever recorded. But as long as FRA lacks the authority to suspend an employee's operating privilege for conduct unsafe to the public, our ability to protect rail passengers and employees from the consequences of workplace misconduct will remain inadequate.

Mr. Chairman, in the weeks ahead, conferees from the House and Senate will begin the difficult job of meshing conflicting versions of the House and Senate safety bills. You will also have an opportunity to strengthen the authority of Federal safety agencies to deal with alcohol and drug use in the transportation workplace.

We wish you well in those objectives. You carry our hopes with you. If we can accomplish them, the Chase accident will be remembered as a turning point in railroad history and the lives that were lost there will be very meaningful lives.

If we cannot accomplish these objectives, the Chase accident is going to be an even greater tragedy than any of us currently perceive.

Thank you for your time, thank you for your work, and thank you for your commitment.

The CHAIRMAN. Thank you, Mr. Riley.

You would win your case before any jury. Have you tried it over on the House side? Have you testified?

Have you testified before any committee on this score?

Mr. RILEY. Mr. Chairman, well, I do not believe that I can recall any hearings on the drug issue on the House side last year.

The CHAIRMAN. They have not had any hearings on the drug issue in transportation before the House of Representatives in the United States Congress?

Mr. RILEY. I have not participated in one. I cannot say with certainty that they have not had one.

The reason for the laughter in the audience is the people who, for whatever morbid reason, like to attend these hearings know that I probably set a Guiness record for the number of hearings testified before last year.

The CHAIRMAN. But never in the halls of the House of Representatives?

Mr. RILEY. Many of them were in the House of Representatives. We had many. We had many hearings on the safety bill. We had many hearings on the various issues raised in the safety bill. We had a hearing on the CAMI situation.

But we did not have a hearing, that I can recall, on alcohol and drug random testing per se. I have raised that in a number of hearings. But I have to tell the Chairman that I cannot preclude the possibility that there was one that I was not invited to.

But I have made the case, Mr. Chairman. I made it wherever I could. I have made it here, I have made it in public forums. I have made it in more than 20 hearings inside both Houses of Congress because I think it is real.

And I did not start out with this position. I started out believing the opposite because I am basically a civil libertarian. I have come around because I have seen what happens in the workplace when you do not do what this committee is trying to do.

The CHAIRMAN. Well, therein is the problem. You know, we can keep on putting on these hearings and nice stories, but that is the problem.

You find the overwhelming so-called right of privacy. We find it with respect to drug testing for the recruits in the Army. I had to fight that for five years. You would be amazed, but all the volunteer Army folks have been going in up until this year, and they will test them with blood tests and whether they have got flat feet and whether they can see and whether they have got dandruff and anything else, but they will not test them for drugs.

They will test them afterwards, which costs me 437 million bucks, because after they are in then they have got all the rights, and I have got to rehabilitate and I have got to courtmartial and I have got to counsel, and that part of my budget in the Army and the armed services goes up, up, and away.

And they accuse me of sneaking things in in the dark of night. That is one provision we put in the continuing resolution, so now they will have to do it. They said they did not have the ability. They found the ability with respect to AIDS testing and they will find it on this.

And I find that if I go around the corner here on the Intelligence Committee, if you want to get a job in the FBI you get a polygraph preclearance. The Secret Service, Defense Intelligence Administration, National Security Agency, if you want to get a job like the Capitol Policeman standing in that door, you apply, and if your application looks good then the next thing they do is give you a polygraph preclearance, before they send you off to school down in Georgia, a polygraph or a polygraph preclearance before you can be a Capitol Policeman.

But on the staff of the Intelligence Committee, no. No, that would offend their sensitivities or some other nonsense. I do not know what it is—rights of privacy.

So we have got the real gridlock of all the intelligence information without any security clearance. It is interesting, is it not.

We do not do it for ourselves, so why do it for the engineer?

Mr. RILEY. It seems remarkable to me.

The CHAIRMAN. We do not even have a hearing on the House side.

Mr. RILEY. I do not think that you would find anyone to dispute the proposition that before an engineer gets behind the controls of that locomotive, he ought to be able to prove that he is adequately trained and physically capable of doing the job.

We have endorsed that in every State with our training, licensing, and physical requirements. And yet, we do not require him to prove that he is drug-free.

The CHAIRMAN. I just got through renewing my motor vehicle operator's license, my driver's license. And they have to test your eyes again to make sure that you can still see and have good 20/20 vision and everything else. Nobody talks about the right of privacy there.

I just do not understand the political shenanigans that we are allowing to continue.

Now, you have gotten a real grasp of this thing. I understand that as a civil libertarian you have been more than reasonable. Let us see, you have got the counseling and prevention and the bypass program, and you can reclaim your job on that bypass program without any loss of seniority. You cannot be any more reasonable than that.

We are not out to get folks in the unions. We are trying to make it absolutely attractive to them, and in some fashion or form to not be disciplined, but be treated and still hold a job, still hold their seniority.

You cannot make it more reasonable than that.

Mr. RILEY. We have tried to create every incentive we could for people with problems to come forward before they are involved in an accident.

The problem you have with the present system is that I think we owe it to the public to do more than wait until an accident occurs and then test to see what caused it, or to wait until someone is in the workplace giving evidence that he has taken drugs before we test him and take him out.

We have got to try to find these people early. We have got to try to give them incentives. I do not want to just save lives in the quantitative sense. I want to save them in the qualitative sense by getting people into rehabilitation programs and trying to help them. That is what it is about.

The CHAIRMAN. I agree. We can with that program actually save as many people from drugs as from death from accidental occurrences.

So it helps all sides. If I was running the union, I would put it in tomorrow.

Mr. RILEY. Well, there is some irony there, because 90 percent of the people who are killed in these accidents are in fact operating employees, and it is their lives that we are trying to save. They are the primary victims.

You made a comment on rights and I would like to make a comment of my own on that. It is very important to consider individual rights. I have often been asked, well, why did it take more than a year to write the alcohol and drug rule? And the reason is because we met every other day and laboriously considered how we could protect the private right along with the public right.

But consider this balance. We all accept the thesis that speech, perhaps our primary right in this society, does not justify a call of "fire" in a crowded theater.

And consider this tradeoff. Under a random testing proposal you or I—and I am working under one—will probably be called once a year on the average to take out 20 minutes to give a drug test.

What do you balance on the other side of that? The balance is in these numbers. In the last year, 41 accidents, 29 deaths, 341 innocent people injured, and more than $28 million in property damage.

It seems to me that when one balances the human cost of those numbers against the inconvenience involved in taking a 20 minute drug test once a year, the balance is both clear and constitutional.

The CHAIRMAN. You have given the hard evidence, Mr. Riley, and we appreciate it.

Senator Danforth.

Senator DANFORTH. Mr. Riley, I would like to ask you a four-part question which raises some of the objections to drug testing and ask if you would respond to these various objections.

First, that drug testing, it is said, is not accurate. Then one of the things that is pointed out is the FAA traffic controller who was publicized in the front page of the Washington Post within the last few days. And so I would like you to address the question of accuracy of drug tests.

Secondly, it is said that to test for the traces of drugs in the system does not necessarily test for impairment while on the job. How do you address that concern?

Third, rail labor has said that it would not be against testing based on the training program for testing that has been studied by the Los Angeles Police Department. I am not sure I know what that training program is. But what are your views on that position?

And finally, the two judges of the Ninth Circuit Court of Appeals who held the post-accident testing program unconstitutional said that, while jockeys are highly regulated, rail safety regulations focus on locomotives and track and not on rail workers, and they drew that distinction as a justification for their opinion.

If you could just go through briefly each of those four points, I would appreciate it.

Mr. RILEY. Let me take them in reverse order. I think the committee will understand that I, having a case on appeal before the Ninth Circuit, do not have enthusiasm for debating with them in this forum.

Let me simply make the point that I believe the Ninth Circuit's interpretation of Shoemaker is at odds with several other circuits; that in fact, the extensive regulation that we have over railroad companies should authorize administrative probable cause.

But I can make the point that, should Congress successfully conference the bill that would give us jurisdiction over railroad employees, it would moot that part of the decision.

Secondly, the Los Angeles Police Department. I do want to focus on this, Mr. Chairman, because it has been often said that if we would just agree to a reasonable program like the L.A. Police Department program, we could have universal support.

83-232 0 - 88 - 3

Let me tell you about that. That is not a testing program. That was a field experiment to determine whether experts could pick the drug of choice used by obviously intoxicated individuals.

The control group used was composed of people who were obviously impaired or intoxicated and who had already failed a field sobriety test. In other words, before people were even exposed to the potential of testing under this program, they had already given the kind of "smoking gun" cause that would enable us to discipline them without testing. One expert described them as the most obviously zoned out people that could be found in southern California.

Senator WILSON. Mr. Chairman, that is no small statement.

Mr. RILEY. Even within this very specialized control group, in the field test part of the program, the experts failed to identify cocaine in 81 percent of the cases. In the field test portion of the program, they failed to identify marijuana in 40 percent; in the laboratory phase, in 67 percent.

The bottom line, Mr. Chairman: We cannot tolerate error rates like that in the railroad environment. Even without the FRA testing rule, we could test everybody in that control group.

And I think what it illustrates is that the L.A. Police Department effort is a very interesting and useful research project, but it is not a testing program. If anything, it is a non-testing program. And I think it has been set up as a straw man to divert attention away from what is really a broad-based opposition to testing.

On the question of accuracy, the tests that we take all go to a single laboratory. They go to the Human Toxicology Center at the University of Utah. It is our laboratory, it is the NTSB's laboratory, and it enables us to monitor quality because all the tests are done in a single laboratory.

The Utah laboratory is in fact the reference lab that is used to test the accuracy of all other labs participating in proficiency testing in this country. It is in fact the gold standard, and its test results are, in effect, being cross-checked by every other lab in the country participating in proficiency testing. It is the best laboratory.

I have to emphasize that even a year ago, with all of the problems that occurred at the FAA laboratory at CAMI, that laboratory had been used by many people for many years. The procedures built into our program detected those problems in less than a year and brought Mr. Lacefield to his just reward.

But when the drug tests taken at that lab were retested, every single one came up positive again.

I am very confident in the accuracy of this program. We have done everything we can to protect the employee. The chain of custody requirements are rigorous. The employee signs the vial. It is sealed with evidentiary tape which, if moved at all, leaves an indelible stain on the sample. He then signs across the seal.

After the sample is chosen, it is double-logged in the laboratory. It is double-logged to prevent a clerical error. It is then frozen and preserved, so that, if the employee at any time wants to challenge the

accuracy of the test, everything from the moment at which he gave the samples up to the point of testing is preserved for retesting.

And at the request of labor—and I thought they were right, frankly—we rewrote the rule so the tests would not be performed by corporate officers, but rather, would all be taken in independent medical facilities. And while that tends to slow the tests down, which is why it sometimes takes three or four hours to get them, I think it is worth it because I think the individual deserves that kind of attention.

I am working under a random testing program. I have no fear whatsoever.

And I think this is one of those issues that it is easy to understand. You can really understand why people fear something like this the first time they are exposed to it. I do understand that.

But I think it is an issue that is going to decrease with time as people experience these programs.

It is very difficult for me to comment on the Washington Post story because that is a different program. I am really not familiar—I am under that program, but I am not familiar with all of its intricacies.

Senator DANFORTH. Could you give a percentage of accuracy?

Mr. RILEY. I would hesitate to conjecture on that. I can only tell you I have absolute confidence in it. And even the reasonable cause tests, which are done by the railroad companies are done under very strict requirements.

They can only use laboratories which do both screening and compound-specific secondary testing—GCMS. In other words, we do not allow people, even under our railroad reasonable testing program, to take it down to the corner drugstore.

Within our field manual, within our technical requirements, the requirements are very strict because they should be. I think protecting the integrity of the employee is as important as any other phase of this program, Mr. Chairman.

Finally, impairment while on the job. In the alcohol area, I think there is a consensus on what constitutes impairment—.04. .1 is beyond impairment. In the drug area, there is not a consensus in all cases over what constitutes impairment.

But bear this in mind: When you find an employee who is testing positive, you know that you have a user. You know you have a user and, contrary to the argument I have often heard, using drugs is not like taking alcohol. There are many people who do not drink wine to get drunk, they drink it because they enjoy the taste and the feeling of it, short of impairment.

I do not know anyone who smokes marijuana because they like the way it tastes. When you take cocaine, when you take speed, when you use marijuana, you use it only to get impaired and for no other reason.

And I think the high frequency with which we—and I notice a lot of smiles in the background among the staff. We probably have some experts here beyond my expertise.

I guess the point I want to make is, last year—I guess the point I want to make is we find positive drug tests at whatever level with alarming frequency after accidents. In more than one out of every five qualifying accidents, somebody fails a drug test.

I do not believe that one out of every five railroad employees would fail a drug test or that one out of every five trains has a drug user on it. But I think there is a correlation there.

The CHAIRMAN. There is a correlation with crime. Fifty percent of crime is drug-related in this country, and accidents are the same way.

Senator DANFORTH. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Exon.

Senator EXON. Mr. Chairman, I have nothing significant to add except to thank Mr. Riley for the outstanding job he has done in this area.

And I think this committee stands with you completely in saluting your efforts that you announced this morning that, as you are testifying here, the appeal is going forward. I mean, I think that is a must, and that has to be the first line of resistance as we move forward in this very, very important area.

I simply want to say and emphasize once again what Chairman Hollings alluded to in an earlier statement, and that is that those of us who are intimately involved with the armed services of the United States should keep saying and the public at large should fully understand, that two and a half years ago we had a major drug problem, especially in certain sectors of our armed forces.

We put testing into effect, we got tough. And I am advised by senior military command today that in a short, two-year period, we all but have eliminated a very prevalent policy that was reaching extremely dangerous proportions.

I simply say that that is a success story that can be followed very dramatically in the non-military workplace and workforce if we have the courage to press ahead.

I salute the leadership of this committee, the Federal agency headed by Mr. Riley, and other important resources that are being brought to bear. It is time we moved forward aggressively, because we know how to get at this problem if we have got the will to follow through.

The CHAIRMAN. Thank you.

Do you have anything to add, Mr. Riley?

Mr. RILEY. Just a brief comment. I cannot thank the members of this committee enough for the hearing they have given us over the last couple of years on this issue. I know it is a very, very tough issue.

Like you, Senator Exon, I come from a labor family. That is where my roots are. But you know, those are the very people whose lives we are working to save. And sometimes it is tough.

In an issue like this one, the people whose lives are being saved do not know it by definition, so they are never here to say thanks.

But I think we have got to remember what this is all about. It is all about Roger Horn, it is all about Ricky Gates, who could have had a very different quality of life and fewer burdens to bear had our drug program been a bit more effective and more extensive.

And it is about you and me. I am going to get on a Metroliner at 2:00 o'clock this afternoon to go to New York. Any of us could have been on that train on January 4th.

I think that there is a responsibility that comes with public office to lead public opinion and not always to follow it, to try to take tough positions when they are right and when you are sure that they will wear well with time. This committee has done that and I thank you for it.

Senator DANFORTH. Mr. Chairman, I know there are other witnesses and I would just take one minute.

Senator Exon talked about his background with unions and Mr. Riley said he is from a union family. I would guess that many, many, maybe a majority of union members would agree with this legislation. I would guess that almost 100 percent of spouses of union members would agree with this legislation.

I cannot believe that the average union member wants to get on a train that is operated by somebody who is impaired by drugs or alcohol. I cannot believe that the average family member of the typical union member would want their loved one to get on a train or a plane with somebody who is impaired by drugs and alcohol.

Human beings are human beings. They do not want crazy, insane things done to themselves or to their family members. I cannot believe that the unions that have mounted this opposition to this legislation are speaking for their members. I cannot believe that they are speaking for the families of their members. And I know that they are not speaking for the American public.

Mr. RILEY. Mr. Chairman, and I am not absolutely sure that they are even speaking for themselves. The union leaders that I work with are good people, they are sincere people.

But they are subject to the same political pressures that you and I are. And I think this is an issue that has become politicized, that people in labor and management and, frankly, for too many years in government, have been afraid to take a leadership position on.

When I talk to railroad employees, what I find is that the average employee is torn by two feelings. On the one hand, no, he does not want to give management any more control over his life; but on the other hand, just about every one of those guys has been out on a shift somewhere, sometime, where they felt their life was in danger because of another employee.

And the attitude that I pick up is that they are willing to give these programs the benefit of the doubt, to see if they are run fairly, to see if they are handled well. And if they are, I think they can live with them, because we are right. You know, we have different titles, I am an Administrator, you are Senators, they are employees. Some of us are Republicans, some of us are Democrats.

But underneath it all, we are all people with the same kind of concerns for our families and the same kind of regard for fellow individuals. On more times than I can tell you, I have had labor people call me up on the phone to say: I wish I could get up and endorse this with you.

It is particularly true on jurisdiction over the employee. I would be the first to concede that random testing is a somewhat tough issue. It is an issue on which some minds could differ. Jurisdiction over the employee—what possible argument do you have that railroad employees should be the only employees in transportation that are not accountable?

But I think these arguments are ones that have to be made, not arguments that even the people who make them believe ought to be followed. And I think we may do people a great favor by following through on these proposals.

The CHAIRMAN. You are handling the problem extremely well Mr. Riley, and we appreciate it very much.

Senator EXON. May I make just one short comment. Thank you for the statement you just made, Mr. Riley. I think this puts this all in perspective, which is what I was trying to do.

The major concern I find with railroad labor people you alluded to is whether this bill going to give management unnecessary control over their lives. And the main hangup that I have dealt with and criticism that I have received for actively supporting this type of legislation goes away once I convince the people that random testing is just exactly what it means, it cannot be used, will not be used and we will make certain that this testing is not used as some kind of a tool for management.

And once that is explained and understood, I find that union people are as enthusiastic about what we are trying to do as anybody else.

Mr. RILEY. You know, random testing is the best possible guarantee of individual liberty because the tests are drawn right out of the computerized random number table. There is no latitude for management to interfere with that process without easily being apprehended. It is the best possible guarantee.

When you see this almost ideological opposition to testing, it seems to suggest that some of the leaders care more about protecting the people who use drugs than the ones that do not. But I do not think that is their view. I do not think that is their view and I do not think that is the view of their members.

I think it is just one of those positions you get forced into over time by the political process. And I think if it were not for the glare of politics and lights and the elective pressures in our private organizations as well as our public, we are all people of goodwill. We could probably sit down in a room and construct this program in an hour and a half.

The CHAIRMAN. Very good. Thank you, sir.

And we will now hear from Mr. Ricky L. Gates.

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Mr. Chairman, I would ask unanimous consent to make a statement.

Mr. Chairman, it has been just over 1 year since this Committee held a hearing on the specific problem of substance abuse in the transportation industry. I congratulate you for scheduling today's hearing. It will enable us to better understand both the advances and setbacks we have experienced in this area over the past year.

This is a very timely hearing following the February 11 ruling by the Ninth Circuit Court which struck down the FRA's drug and alcohol testing program for post-accident and safety rule violations of rail workers. I know that my concerns over this recent court decision are shared by a great number of us here today.

Indeed, the critical issue of drug and alcohol abuse must continue to be addressed seriously. The rise in positive drug and alcohol tests performed on railroad employees over the past year greatly troubles me. I hope that we can work with the industry and administration to keep this trend from continuing. We need to assure that our transportation system is free of all forms of substance abuse. The negligent acts of a few can no longer be allowed to destroy the futures of many.

Mr. Chairman, thank you for holding this hearing. I look forward to hearing from today's witnesses, all of whom I think will provide us with very enlightening insight into the serious problems caused by substance abuse.

The CHAIRMAN. Ms. Shearer, I understand as counsel you would first like to make an opening statement on behalf of Mr. Gates. And we welcome all four of you to the committee, and we would be glad to hear now from you, Ms. Shearer.

STATEMENT OF RICKY L. GATES, ACCOMPANIED BY DONNA SHEARER; CARL SCHLAICH; AND DEIDRE BOSLEY, COUNSELS

Ms. SHEARER. Thank you, Mr. Chairman.

My name is Donna Shearer and, along with co-counsel Carl Schlaich and Deidre Bosley, I represent Mr. Gates in the Conrail-Amtrak crash case. I respectfully ask for this committee's indulgence for a brief counsel statement, after which I know Mr. Gates desires to address the committee and answer questions.

As you may know, the United States Attorney for Maryland has started an investigation into allegations that a United Transportation Union official knew that Mr. Gates had used drugs on the day of the crash and that that official concealed that information from the Federal investigative agencies.

Because of the ongoing investigation, we have advised Mr. Gates not to answer any questions about this matter.

In January, the National Transportation Safety Board issued their probable cause finding. They stated that marijuana impairment was the primary cause of the accident. We as defense counsel do not believe that that is correct. It is our understanding that the State's Attorney for Baltimore County shares our belief.

We believe that the cause of the accident was Mr. Gates' inattention to his duties. While the act of using the marijuana contributed to his inattentiveness, there is no proof that Mr. Gates was impaired. We believe that it was Mr. Gates' long-term alcoholism that caused his inattention.

Thank you.

The CHAIRMAN. Thank you, Ms. Shearer.

I think as counsel you properly advised Mr. Gates.

And Mr. Gates, we would be delighted to hear from you at this time. If you want to move that microphone a little closer.

Mr. GATES. You have to excuse me. I am very nervous.

After my guilty plea was entered, I stated my desire to aid those groups interested in making passenger travel safer. That is the reason I am here today.

I am not here today to tell this committee what legislation it should recommend, but to relate my experiences in the industry, in the hopes that a tragedy of this magnitude will never occur again.

As I said on January 16, 1988, I have relived the events of January 4, 1987, over and over again in my mind, and the pain never goes away. I cannot begin to imagine the pain and the grief I have caused those touched by the accident. I am sorry. I hope my testimony can aid this committee.

I believe that random drug and alcohol testing is the appropriate response to an industry-wide problem. My experience has led me to believe that testing based upon a reasonable suspicion standard is not effective. I say this because I believe that standard provides little, if any, guidance for those actually in the field.

Furthermore, the discretion inherent in this standard means there is little uniformity in its application. Although supervisors are told that absenteeism may be an indicator of a drug or alcohol problem, leave practices in the industry make it difficult to identify employees with a drug or alcohol problem based on sick leave usage.

Because regular days off are often withheld from deserving employees, many employees call in sick simply to get a day off. Therefore, accumulated sick leave cannot be used as an indicator of an alcohol problem.

Use of the reasonable suspicion standard would not have detected any problem with my behavior on January 4, 1987. I had not ingested any alcohol or drugs prior to reporting for duty that afternoon.

Detection can be circumvented by drinking or doing drugs while on the engine. Sometimes crews stop the engines to purchase beer and consume it on the engine.

Lastly, for any standard to be effective, management must be sincerely committed to its enforcement.

I believe that even when there is clear evidence that an employee has a drug problem or alcohol problem, management often looks the other way. I know this because once when I was called to work from the extra list I was told by the dispatcher—or I told the dispatcher, rather, that I was intoxicated and could not work.

I was told that if I did not report for work I would be cited for refusing duty. When I got there, even though I was intoxicated and refused to sign the register, I was told I looked okay and was ordered to go on the train anyhow.

Working off the extra list may also contribute to an employee's alcohol problem. When you work off the extra list, you are on duty 24 hours a day and are given two hours to report for a job. This work practice causes two problems:

One, because of the irregular working hours, it is difficult for management to determine if there is a reasonable suspicon to test an employee for drug and alcohol abuse;

And two, the irregular work hours tend to make the employee's alcohol problem worse because of isolation and boredom. I know that I could often justify my alcohol consumption at odd hours by telling myself it was because I had such an erratic schedule.

For the reasons I have just stated, I believe Rule G's reasonable suspicion standard is not effective in identifying those employees with a drug or alcohol problem.

I believe the current industry employee assistance program is not effective. Through the education and self-knowledge I have gained in my recovery program, I believe the hallmark of the disease is denial. Because of that, you need to educate not only management but also the employees.

Unless a climate is created where it is acceptable to come forward and seek treatment, the employee assistance program will not work. That climate does not exist in the rail industry.

I believe that drug and alcohol use is widespread in the industry. Certain factors in the industry contribute to or encourage alcohol abuse. Those factors are:

One, the stress on the job;

Two, the disruption of one's family life;

Three, the irregular hours;

And four, a prevailing climate where drinking excessively is acceptable behavior, even perhaps normal.

While I support random drug and alcohol testing, I want to emphasize that the focus of any testing program must be to find and rehabilitate substance abusers so they can return to work as reliable employees. The danger in any testing program is that it can be used to punish those employees it is designed to rehabilitate.

Finally, although I realize that the immediate concern of this committee is substance abuse in the rail industry, please do not allow this particular problem to overshadow equally serious ones. Poor equipment maintenance and management's attitude regarding safety may lead to more disasters.

Maintenance workers on Conrail are scarce, and some of those who are available are not properly trained. Inspections are not frequent enough. Managers, frequently quoting the saying "We have got trains to run,' instruct engineers to do their own maintenance work or ignore problems altogether. Company profit sometimes is put ahead of the safety of employees and the public.

Please use your authority to address all of these problems equally.

Thank you.

The CHAIRMAN. Mr. Gates, this is the first opportunity I have had to see your statement or hear you this morning. Two things strike me:

One, the fact that you do endorse random testing. You find a need. And then of course, the very statement made that on occasion you told the employer yourself that you were not in a condition to operate and they said go ahead and operate anyway.

Let us get to the first part, with respect to the need for random testing. What is your experience with the railroad? How many years have you been in railroad work?

Mr. GATES. I worked there for 14 years, sir.

The CHAIRMAN. 14 years overall, not just at Conrail or Amtrak?

Mr. GATES. Yes, sir. I was originally hired by Penn Central, and I worked for Amtrak and Conrail.

The CHAIRMAN. I see. For 14 years in all?

Mr. GATES. Yes, sir.

The CHAIRMAN. Did you have any problem whatsoever before in any other employ with respect to alcohol, drugs, or anything of that kind?

Mr. GATES. Yes, sir.

The CHAIRMAN. With respect to coming on the job in railroad work, did they ever test you or whatever? Did they ever give you any tests?

Mr. GATES. No, sir.

The CHAIRMAN. And would you please elaborate for the committee where you make the statement, "I believe that drug and alcohol use is widespread"? Elaborate on that for us, please.

Mr. GATES. Well, by my experience on the job, I cannot point to specific people and so on, but overall drinking was encouraged on the job, especially when I was originally hired on.

The CHAIRMAN. You say they stopped from time to time operating a train to get a beer and drank the beer in the cab?

Mr. GATES. Yes, sir.

The CHAIRMAN. From what you have seen over a 14 year period, what portion would be drugs and what would be alcohol? I do not know that that is too important. I am just trying to get a feel for it.

Is it mostly a drug problem—marijuana, cocaine, speed, or whatever they call it, more than alcohol, or about the same amount?

Mr. GATES. I consider alcohol a drug also. That is the predominant problem.

The CHAIRMAN. But from your observance—and because I think that one can more or less tell when alcohol is involved, but not necessarily about drugs. I cannot from time to time. The average person I do not believe can, either.

But you can tell about alcohol. And I am just wondering, from the standpoint of your experience, is it mostly drugs or alcohol?

Mr. GATES. From my own experience, it was equal, I would say.

The CHAIRMAN. About an equal amount?

Mr. GATES. Yes, sir.

The CHAIRMAN. Would it be just brakemen, just engineers, people around the yard, or people in management as well?

Mr. GATES. I never consorted with management often enough to be able to answer that one. But among my own peers—engineers, brakemen, conductors, yes.

The CHAIRMAN. Engineers, brakemen, conductors.

I take it on this one occasion that you pointed to in your own testimony, where you called in and said you were not ready to go to work, they said come on in anyway and that you looked okay. Can you elaborate on that?

Mr. GATES. Well, it was a clerk that called me, that is required to order me for work. At that time he was going to show me refusing duty, which would have put me under disciplinary measures at work, and also it would cause him some hardships.

And so I told him more or less that I would show up at work if he would call the trainmaster that was on duty and tell him what condition I told him I was in. I told him I was drunk.

I told him I would have a friend of mine drive me to work because I was not capable of driving myself, and we would put it in his lap and let him decide, with no intention myself of actually having to run a train that night.

When I did show up, I stopped briefly and got a coffee and walked into the back room where the trainmaster's office was. My crew was already there with him and was aware of what to expect from me when I walked in. I was spilling the coffee all over the place because I was not walking straight.

And he told me I looked okay and that another member of my crew would keep me awake during the trip.

The CHAIRMAN. What about the attitude of the employees? That indicates to me that when you do get in trouble and know you are not in a condition, that you do not mind stating so and you do have this responsibility foremost in mind.

If you had a vote amongst the employees you have been with on random testing, would they vote aye or no? Would they vote and say no, we do not want to have such a thing, or would they vote and really consider it good for them as well as the traveling public?

What would be your opinion?

Mr. GATES. Well, I know the union's position on it. I cannot answer for the other employees. But I know for myself, I would think, based on that, others would answer similarly.

As I said before, denial is the hallmark of the disease. That is the main thing. Nobody wants to get caught. You will deny and you will lie your way out of it if at all possible, and you will do anything you can to keep from being tested positive, or to even take the test in some instances.

The CHAIRMAN. Senator Danforth.

Senator DANFORTH. Mr. Gates, I want to pursue the same questions that Senator Hollings pursued. How frequently did you operate locomotives while under the influence of alcohol during your career?

Ms. SHEARER. Senator, with all respect, I am going to advise Mr. Gates not to answer that question at this time.

Senator DANFORTH. Can you tell us from your own experience how frequently you saw rail employees perform their job while consuming alcohol or drugs?

Mr. GATES. In recent years, it was fairly scarce. But in past years, mostly because of the working schedule—it is hard for me to explain. You never work off the extra list with the same crews, and it was so far and few between. The employees that I would identify with using alcohol or drugs were somewhat less frequent than it had been in earlier years.

In earlier years also, that is with the older gentlemen, a lot of which are probably now retired, are the ones that more or less showed me that this was the practice. And so I consider it especially in the past, in my younger years on the railroad, that it was a very acceptable practice.

Senator DANFORTH. What would that mean, "very acceptable practice?" Would that mean to you that it was commonplace, that it would be something that you would just see all the time, every day, or once a week?

Mr. GATES. It was almost every trip, because originally I felt that I was not accepted on the railroad, I was not trusted by my fellow employees, because I was not indulging with them originally.

Senator DANFORTH. What was happening almost every trip?

Mr. GATES. Mostly they would not talk to me.

Senator DANFORTH. I mean, what were they consuming?

Mr. GATES. It was common practice for them to bring a bottle, whether it be a pint, sometimes a fifth, or a case of beer per member almost, onto the train.

Senator DANFORTH. A bottle, a pint, or a case of beer per person?

Mr. GATES. Yes, sir. Not every person, but the ones that did indulge.

Senator DANFORTH. That would be almost every trip?

Mr. GATES. Almost, yes, sir.

Senator DANFORTH. How frequently would that be in recent years? You say it has not been quite the problem?

Mr. GATES. In recent years that has dropped off. And it might not have dropped off. I know for myself, if I was going to do something like that, I would have kept it even a secret from fellow crew members, because you did not know which ones did and which ones did not. And if you were not sure, you just did not do it in front of them.

Senator DANFORTH. You think it is still being done?

Mr. GATES. Yes.

Senator DANFORTH. People drinking up to a case of beer per person?

Mr. GATES. Maybe less than that now. I am not sure because I have not worked there in over a year myself.

I had myself not been doing that as a standard practice. I would wait until I had gotten off work. But with the working schedule we have, I would still be intoxicated on a couple of occasions after drinking prior to reporting for duty.

Senator DANFORTH. Was it commonplace while you were working on the railroad to see people while they were functioning on the job to be drunk?

Mr. GATES. A lot of people. The problem is so extensive, I know even from my own experience. It is really hard to tell because it almost seems normal for that person.

Senator DANFORTH. For that person. But you did know that they were consuming large quantities of beer or liquor on the job?

Mr. GATES. Yes, sir.

Senator DANFORTH. How about drugs? What kinds of drugs have you seen or do you know of that have been consumed?

Mr. GATES. The only ones I am aware of basically are the ones I participated in myself, which basically was the marijuana.

Senator DANFORTH. Basically marijuana?

Mr. GATES. I have seen some cocaine use, and amphetamines are sometimes what other people do. I have not done it myself, but I have seen other people offer me amphetamines and so on to help keep me awake during the trip.

Senator DANFORTH. Have you seen cocaine used by engineers?

Mr. GATES. Not by engineers. I did not usually work with other engineers, because there is generally only one engineer on a train, which I was. And so I was generally working with train crews, trainmen and conductors.

Senator DANFORTH. How about brakemen? Have you seen cocaine used by brakemen?

Mr. GATES. A trainman is a brakeman. They are the same thing.

Senator DANFORTH. How likely are rail employees to turn in another employee for drug or alcohol use?

Mr. GATES. Like I said before, denial is the main part of it. I would not turn anybody in because I would not want them to turn me in.

Senator DANFORTH. Do you know of cases in which employees have turned in other employees for drug or alcohol use?

Mr. GATES. I have never heard of one.

Senator DANFORTH. You never heard of one?

Mr. GATES. No.

Senator DANFORTH. And that is 14 years in railroading that you never heard of that?

Mr. GATES. No, sir.

Senator DANFORTH. How many times have supervisors said that a person is impaired and that he cannot function? Do you know of any cases?

Mr. GATES. Yes, sir. There has been an occasion there where a supervisor has sent someone home, seeing him like that. But I have never heard of it very frequently, any disciplinary action coming forth as a result of that.

Senator DANFORTH. And have there been other cases, other than your own case, when the supervisor said, well, you are good enough to work? Do you know other cases when the supervisor had seen somebody on the job or seen somebody before he goes on the job and allowed him to proceed with his work?

Mr. GATES. My case was the only one where I have experienced someone actually ordering me, knowing me and having me tell them I was intoxicated. I have been in other situations where the person I was working with, we both confronted a supervisor and we were—well, at least he was blatantly drunk, anyway, drunk enough to tell by looking and sniffing or whatever you want to do. And it was ignored.

Senator DANFORTH. It was ignored by the supervisor?

Mr. GATES. Yes, sir.

Senator DANFORTH. Do you think that during the 14 years you have been on the railroad that it has been a common everyday occurrence that people have operated trains while they have been impaired by alcohol or drug use?

Mr. GATES. As I said before, I have not worked there in the past year, but I have no reason to believe that anything has changed. It had slacked off for the past few years that I had worked there as far as visibility. That is why I cannot say whether some of the employees were continuing their practices or not.

But originally when I worked there, when I started working under Penn Central, it was a common everyday practice.

Senator DANFORTH. Do you think that periodic drug testing and alcohol testing would be sufficient? Or do you believe that mandatory random testing is essential?

Mr. GATES. I know for myself, I could get around a periodic test if I knew it was coming up or if I suspected it was coming up.

A random test, a random mandatory test, I believe is the only way to catch somebody, because as I say, again, denial is part of that disease. And if they really have a problem with it, which I believe even for myself that I have a problem with it, especially bringing an illegal substance out there to work or even alcohol on a job such as that—you have a problem if you are doing that.

That is the only way I believe that they can be caught and confronted with the situation, is some sort of intervention.

Senator DANFORTH. Thank you, Mr. Chairman.

Mr. Gates, thank you.

The CHAIRMAN. Senator Exon.

Senator EXON. Mr. Chairman, thank you very much.

Let me ask you this question, Mr. Gates. You testified this morning that you are in support of mandatory drug testing, and I thank you for that. You testified that, while you cannot speak for the union members as a whole, you suspect that they feel basically like you do, that they would be in support of fair testing of some type on a broad base, that could not be misused by management.

My question is did you—or in your best judgment now, would you have agreed with that statement, with your present position, before the tragic accident?

Mr. GATES. No, sir, not at all.

Senator EXON. You would not have?

Mr. GATES. No, sir.

I had a disease, or I still have a disease and always will. And like I say again, denial is part of that disease. I would lie, and I did, cheat and steal, more or less, not to be proved to have a problem.

I did not want to have a problem. Therefore, I was not going to tell anybody.

Senator EXON. So that we could conclude from your statement that, despite the tragedy, you have learned and it is your belief that, at least partially, as partially as a result of this tragedy and the publicity given it, that others in the railroad labor field might also come to realize and recognize and indeed support some type of a fair random testing?

Mr. GATES. My recovery program that I am in now—as a matter of fact, today is a year clean for me, and that is special to me. And it has taken a long period of time throughout this year for me to progressively get more and more honest with myself and see the problems through my life that my disease had caused.

In regards to other employees, I believe anybody that is using alcohol or drugs in the work place has a problem. Even if they are not using it in the work place, if they are on call, so to speak, and they may be showing up after using it at home or wherever they have been, that also constitutes a problem.

The union's position—I know outwardly they speak in union literature which I have received that they are basically for it, but they want certain guidelines. I have never seen them specifically say what those guidelines might be.

My lay person's opinion has always been that it was a bargaining chip.

Senator EXON. Either before this tragic accident or subsequent thereto, have you known of any one of your personal acquaintances that have turned themselves in for voluntary treatment, as the rules and regulations of the Federal authorities allow?

Mr. GATES. I have never known anybody to turn themselves in. I have known a couple of employees that were caught and more or less forced to go in for treatment, and they are doing very successfully now.

Senator EXON. So you do not know of any individuals through their own volition who have come forward or that their family or friends have exposed their problem and they have been forced into treatment in some area through that means?

Mr. GATES. I do not wish to break anyone's anonymity, but there are a couple of people, I have found out since, while I was working on the railroad. I never knew of anybody doing it.

But anonymity is a special part of the treatment of the disease, I believe, and for obvious reasons of disciplinary action.

I believed at the time that the company would harass me for other violations of other rules in order to get me for something else if they had known that I did have a problem or if I admitted to it and sought treatment myself, because, based on other areas, if I more or less had an argument or a conflict of interest with one of my supervisors, I would know that he would bide his time and later, maybe a month or a year down the line, get me for a violation of another rule that had nothing to do with what our conflict was about.

And since then, though, since I have been in my recovery program, to answer your question, I have met several people that are in recovery that I had not known about before.

Senator EXON. Mr. Gates, Mr. Riley, the Federal Railroad Administrator, testified earlier that, of the 41 or 42 railroad accidents in the past year, there was a tremendously high percentage of those directly involved in those accidents who tested positive for drugs or alcohol.

From your experience—and that has to be not only first-hand, but hearsay and from your knowledge with 14 years as a railroad employee—do you believe that there are "widespread" problems with alcohol and drugs among the operating people on our railroads?

Mr. GATES. I believe there were 25 that tested positive out of the 41. I have been following it fairly keenly.

My own opinion, even a small percentage would represent a widespread problem. And I believe that that is the case, that it is widespread.

Senator EXON. So that I am not confused by your answer, you said even if it is a small percentage it is widespread. Again, I am not trying to trick you or put you on the spot, but I am trying to get information.

Let me ask you—let me phrase the question this way. If you had to make an uneducated guess as to what percentage of the operating people on railroads today were impaired by the use of alcohol or drugs or a combination of the two on a regular basis, would you estimate or guesstimate that that was 10 percent, 20 percent, 50 percent, 80 percent?

Mr. GATES. My earlier experience, I probably would have said something like 80 percent. Based upon the last couple years I can remember working on the railroad, in my own opinion a best guess would be anywheres from 10 to 20 percent.

Senator EXON. That is still a pretty high percentage.

My last question has to do with something that I have asked several witnesses. You described when you came in one time that you did not think that you were in a position to handle your duties. You were spilling coffee and so forth and so on.

You went in to your supervisor and he said: You look all right to me, go ahead, and you will receive help.

In that regard, I would simply say that under the rail safety bill that we passed out of here, that is awaiting action over in the House of Representatives, we have provided that railroad management could be personally responsible.

If, for example, it could be proven that the worker did not think they should go out, but if a management official said, you go anyway, that they were individually responsible jointly with the operating person. And so I think that is a step in the right direction to make everyone responsible.

But what is the typical situation on the railroad that you worked for with regard to the crews when they went on duty? Did each member of the crew see each other?

What was the typical crew on a Conrail train? The day that this tragic accident occurred, you were the engineer, and you had a brakeman, I suppose, and an assistant.

Did you have a conductor? How many operating people were on that train?

Mr. GATES. I have been asked to specify that the incident where I was ordered to work intoxicated was years ago.

In regards to the question about the accident, it was just Butch Cromwell and myself, the two of us. His capacity was brakeman that day, not as a conductor, and I was the engineer.

Senator EXON. How many railroad employees were operating that train? You were the engineer?

Mr. GATES. I was the only one who was operating it.

Senator EXON. You were what?

Mr. GATES. I was the only operator.

Senator EXON. What other people were on that train?

Mr. GATES. Just Butch Cromwell.

Senator EXON. Just two of you on this train?

Mr. GATES. Yes, sir. These were light diesels. It is considered a train technically.

Senator EXON. So there were just two of you?

Mr. GATES. Yes, sir.

Senator EXON. Now, what would an ordinary train have, where you were going a considerable distance, taking a whole lot of cars? What would the makeup of the crew be?

Mr. GATES. Three members: myself, a brakeman, and a conductor.

Senator EXON. Of that typical three-man crew, before the point where this crew takes over, does this crew ever see each other all together in one place, or would it be possible for the two of you to get on the engine and the conductor go back someplace else, and you would not converse or see each other?

Mr. GATES. Generally, we saw each other. The reason—it used to be a four-man crew, but now they have gone to a three-man crew in the past couple of years. They have no more cabooses on the end of the trains, so everybody is riding up front, and there is generally, the engineer and the brakeman will generally ride the lead unit, and the conductor will be on one of the trailer units.

Senator EXON. Would it be normal for the management supervisor of that crew to see each and every member of that crew, three-man crew, either individually or as a group before the train left the station?

Mr. GATES. Yes, sir.

Senator EXON. So management would at least have an opportunity to observe the condition of each member of that crew.

Mr. GATES. Yes, sir, that is true.

Senator EXON. Thank you, Mr. Gates, and thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Pressler?

Senator PRESSLER. Thank you very much.

I certainly say I want to thank you for your candor in coming forward, and it is certainly not my purpose here to berate you or in any way to put you in an uncomfortable position, and I do thank you for your willingness to appear before this committee.

I was intrigued with an earlier question because I am very much intrigued with the problem of the disease of alcoholism and our recognizing it as a disease and treating it, but yet I believe that the Federal Government itself does not recognize alcoholism as a disease yet, or at least not in some of the health insurance programs and so forth, and I think there are some cases before the Supreme Court. So this is a matter of debate and so forth.

I myself do consider alcoholism a disease, and I have worked with a lot of these groups that are working in the treatment of it.

But earlier on you were asked if you had ever turned anybody in who was drinking. But in the context of that time, even if you had turned somebody in, what do you think the supervisor would have done?

Mr. GATES. The only thing I could answer there would be pure speculation because I'm not really sure what he would have done. I presume it would have depended on how well a relationship the supervisor had with the individual and those type of factors.

Senator PRESSLER. A lot of times the supervisor might not do anything, or they might be faced with a choice, do you fire the person or do you somehow get him into rehabilitation? A lot of times there is not, or in those days there was not a rehabilitation program to get people into to give them a chance to get out of alcoholism. I think that is an important thing.

It is easy for us to sit here and say well, we should, when somebody is turned in, they should be put into a program, but does the railroad have a program, like, let's say you had gone to your supervisor and said I have a disease of drinking, what would he have said to you?

Mr. GATES. They do have an employee assistance program, and I believe Operation Red Block was in force at the time I had the accident, as a matter of fact. Very little is known. For me at that time, I knew very little about it, and I just generally did not trust anybody in management being as I did have a disease, and like I say again, denial was part of it. I felt that they would have harassed me in other areas, even if they would have allowed me to seek that help, and say nine months later I was working again, I believe that if they wanted to, they would harass me for my conduct in other rules.

Senator PRESSLER. Well, I think there is a lot of drinking around even in different fields, there is social drinking, and people in this building, and there is alcohol sometimes served for lunch, or there are birthday parties and so forth, and a lot of people operate other jobs with one or two or three drinks in their bloodstream.

Of course, if you are operating a vehicle for public safety, because I feel very strongly that you are taking other people's lives, but when you have a disease of alcoholism, when you have one drink, you probably want to have at least five or six. I mean, that is just the pattern, as I understand it, is that correct?

I mean, you cannot stop at one drink?

Mr. GATES. Yes, sir. As an alcoholic, that was my experience.

Senator PRESSLER. And how many drinks would—of course, it depends on the person, but are we talking about—and of course, by drinks, I guess we usually talk about a two ounce amount of alcohol or a beer or a glass of wine. Would people, are we talking about five or six drinks or 10 or 12 drinks, or how many drinks?

Mr. GATES. Oh, I can only answer for myself. I knew my, as a so-called middle stage alcoholic, which I believe I was, I knew my tolerance very well, and a six-pack would make me feel right, and then after a period of time which you spend hours on duty, if I were going to maintain that, it would take, depending on how long I was out there, maybe a case.

Senator PRESSLER. They say most people who have the disease, five or six drinks sort of gets them up to their high or whatever, and then to maintain that, they have to continue on.

But I think it is important to understand this. Now, of course, having one or two drinks, a person who does not have the disease, quote, unquote, there are a lot of people who—but let's say somebody has one or two drinks, their ability to operate a car, even though they are not alcoholic, I mean, even though they are not up to the 10 percent or whatever the level is for getting arrested, they can have a high, or they do not perform as well, and would you agree with that generally?

Mr. GATES. Oh, yes, yes, indeed.

Senator PRESSLER. But I think a big problem we have is persuading the unions, very frankly, and the public of the need for this random testing. But even if we have the random testing, then we have to have the facilities and the ability to address the problem, whether it is just a casual drinker or someone who has a disease, and treat it. I think that is an important thing.

Most people, they say, well, let's do random testing. I suppose if we find somebody who is drinking or using drugs on the job, presumably maybe somebody thinks we just fire them, but that really will not solve the problem, or maybe it will solve the problem, but they are still going to be around, and I think it is important that we realize we need to recognize the scope of the problem, and that—what is your thought there?

What if someone is caught on these random tests? Let's say we have random testings, the unions object to it, but let's say the unions agree to it and the legislation is passed, or maybe the unions do not agree to it, and legislation is passed. Someone is found with, let's say, first of all, drugs in their bloodstream.

What do you think should be done with that person?

Mr. GATES. I believe the person, first of all, should be suspended from duty. Secondly, they should be brought into an employee assistance program, explain that they are in support of them, that they are not jeopardizing their job. One of my worries was I would not be paid if I did come forward, you know, what would I do about supporting my family? But I believe that every assistance should be offered, you know, the climate or atmosphere provided that the company is supportive of them in recovering, whether it turns out they are an alcoholic or they are just a problem drinker or user, which, you know, we can go rhetorically back and forth with that one. I believe anybody, you know, a problem for myself, I am an alcoholic, and being an alcoholic, I also have a cross tolerance to other drugs, whether I have used them before or not.

Senator PRESSLER. You mean a lower—how do you mean a cross tolerance?

Mr. GATES. Cross tolerance in the sense that even if I had only done alcohol in my life, if I needed some other anaesthetic, say, for medical purposes, I might need to take more of it than the normal person to get the same benefit of the drug.

Senator PRESSLER. What if someone, what would your recommendation be if someone were tested and just found to have a slight amount of alcohol in their bloodstream, but they were not supposed to be drinking before driving?

Mr. GATES. I believe they still have a problem, myself. I would not have said that over a year ago, though, but you know, I am at a point in my recovery right now, I believe that when you are responsible for driving a vehicle, whether it just be yourself there or especially if you are a common carrier like I was, working for it, that your responsibility is even greater, and that you do have a problem if you are doing it.

Senator PRESSLER. What about your personal situation? Are you resolved not to have another drink in your life?

Mr. GATES. I do it one day at a time, but yes, that is my goal.

Senator PRESSLER. Thank you.

The CHAIRMAN. In your opinion, what is the reason, Mr. Gates, that the unions object to random testing?

Mr. GATES. I do not believe they really object to it. As I stated before, from the literature I have seen on the unions' point of view, I believe they are very much in support of it, but I have never seen what they would choose to do about it. I have never seen any definitive argument on why they are against the random testing, how it would infringe on anybody's rights, nothing very specific. It is always generalized.

So I believe myself that it has always been just a bargaining tool with the company for other union issues.

The CHAIRMAN. I see.

And how do you account now for the diminution from, say, the 80 percent perhaps drug use or alcohol use down to the 20 percent in recent years? How do you account for that?

Mr. GATES. Stricter laws and a tighter society towards dealing with it, because it has been harsher, and I believe that has a lot to do with it, but I also would like to, in my own opinion state, though, that even for myself, I cut down my usage on duty quite a bit, not altogether, but quite a bit, and it just drove me into more or less secret drinking.

The CHAIRMAN. Well, from what you have attested to, there is a management problem. It does not relieve, of course, you of your responsibility, but there is no question that there is a management problem at Conrail, and Senator Danforth and Senator Hollings have been educated. We went around here two years saying it was the finest run railroad in the world, trying to sell it, and from what you have stated, we are lucky we have not had more tragedies.

Do you have anything further?

Senator DANFORTH. I am also curious about the reduction. You said several years ago you thought maybe about 80 percent of the people who were operating trains were regularly using drugs or alcohol, and now you say it is around 10 to 20 percent.

Do you think that that reflects a change in behavior, or does it reflect the fact that, as I understand it, the train crews used to operate pretty much the same crew over and over again, and now it is changing and you are on a list, and your name comes up, and you might be with people for the first time, and they might not be as open with each other.

Your judgment is, is there somewhat of an improvement in real behavior, or is it just that you would not be as aware of it under the present situation?

Mr. GATES. There are a lot of factors involved in that. When I started working there, there were many, many more employees and many more jobs for the area I was working in,. and so you were more aware of it because you were around more people. There is a lot fewer employees now. I think contributing to a lot of it is Operation Red Block as a threat, more or less, than an effective operation, and the drug testing that had existed as a threat but not practical, that has cut down on obvious usage.

But I believe that people—and also the fact that since my recovery, I have found out that some people have sought recovery on their own, and in trying to cut down, they realized that they could not stop, as was in my case, I could not stop on my own. I had to seek help. And if I was still working on the railroad, I do not think I would want the company to know about that.

And so, I do not believe that the programs the company offered are effective in what they are meant to be. But for the purpose, as a threat, they do make you cut down, but those really having a problem are still going to do it in secret. It is just not going to be as obvious.

Senator DANFORTH. Mr. Gates, thank you very much.

The CHAIRMAN. Senator Wilson?

Senator WILSON. Mr. Gates, I understand that before I came in it was your testimony that you had been compelled on occasion, when you protested that you did not wish to, did not feel fit to assume your duties, that you were compelled by supervisory personnel to do so, is that correct?

Mr. GATES. Yes, sir.

Senator WILSON. Do you know—this is probably a naive question, but it is not intended to be rhetorical—do you know whether or not either in your case or in any other instance where there was coerced conduct of that kind, that it came to light in terms of being reported either to safety authorities within the railroad itself, whether it was brought to the attention of management of the railroad, or whether or not this was simply a secret that was kept among low level supervisory personnel?

Mr. GATES. I don't know if anybody higher up knew about it. I would—my case is the only one where I can say individually I know that that happened. It may have happened to somebody else. I do not know of a specific case. It was not something we even advertised among ourselves. But I would presume if, say, my immediate supervisors knew about it, it had to have trickled up to a few of the higher management employees.

Senator WILSON. Are you aware of other employees being similarly treated, people who were in your situation, of feeling that they were not able to perform their duties and protesting that they were not able to do so, who were compelled to do so?

Mr. GATES. I am not aware—I mean, I am not saying it did not happen, but I am not aware of any specific cases where anybody protested actually coming to work under the influence. There have been cases where people have showed up under the influence to report to work on my crew, and I suggested they go home, and in some cases they were sent home by the supervisor, or we suggested they go home or say, what is called mark off, and in other cases we simply put the guy on the second unit and told him to go to sleep and leave us alone, and not to get out there and kill himself.

Senator WILSON. Thank you.

The CHAIRMAN. Thank you, Mr. Gates. We thank you for your willingness to appear here, and thank your counsel and your associates.

Mr. GATES. Thank you.

The CHAIRMAN. Our next witness is a brakeman, Mr. Edward Cromwell, accompanied by Mr. Dan Goldstein, his counsel.

Mr. Cromwell, I understand, of course, you were the brakeman at the Chase tragedy of last year. I understand from your counsel, and we will hear from him, that there are cases pending on the civil side, and you would not be in a position to testify whatsoever to the incident, but could testify generally.

Is that right, Mr. Goldstein?

Mr. GOLDSTEIN. That is correct, Mr. Chairman.
The CHAIRMAN. Do you have a statement at all?
Mr. GOLDSTEIN. No, I do not, Mr. Chairman.
The CHAIRMAN. Very good.
Mr. Cromwell, we will hear from you, sir.

STATEMENT OF EDWARD W. CROMWELL, BRAKEMAN; ACCOMPANIED BY DAN GOLDSTEIN, COUNSEL

Mr. CROMWELL. Mr. Chairman, members of the committee, my name is Edward Cromwell. I was an employee of Conrail for 14 years, and I was the brakeman on the Engine No. 5044 at the time of the collision in Chase, MD. It is my understanding that the invitation to testify does not require me to discuss the events surrounding that collision, and on the advice of my attorney, I will not speak about the collision.

However, I earnestly desire to assist this committee by providing whatever information I can about the conditions at Conrail and safety problems that exist.

I do not know whether drug or alcohol abuse is any more or less common among railroad employees than anyone else. But the call system at Conrail greatly increases the risk that someone will come to work impaired by alcohol, drugs or lack of sleep. I also know that there is so little supervision at nights and weekends at Conrail that one can come to work obviously impaired without any supervisor ever knowing about it.

You get your call to report to work over the phone. The one supervisor around may be in the tower, and when you sign in, it is not uncommon that there is no one there who sees you. For all the obvious reasons, it is rare that a fellow worker will report you as being impaired.

At times, you may be sitting in a caboose for 12 hours without even a wheel turning. The boredom of the job together with the lack of concern from some supervisors makes it common for some employees to drink or smoke marijuana while on duty. There are many employees who do not do either one, but for those people who have a problem with drugs or alcohol, it has been very easy to indulge on the job.

Because I only had 14 years on the job, my seniority was such that I was often laid off for six to eight months at a time, but if Conrail had a rehabilitation program available to people with drugs or alcohol problems, I never heard about it.

Obviously, nothing I am saying has to do with an individual's responsibility not to come to work in an impaired condition or get impaired on the job. But I would hope that the legislation under consideration by the committee would help change what I see as indifference to safety.

I would also hope that the legislation under consideration would allow those who need help to get it in a meaningful fashion.

As I understand it, the drug testing proposed in this bill would not leave it up to the supervisor who he wants to put through the testing. If random drug testing was made part of the law, I think it would be an important step in the right direction.

I appreciate you having given me this opportunity to tell you what I know. If I can be of any more help, I will be glad to do so.

The CHAIRMAN. Well, Mr. Cromwell, you define a need, in other words, you say that if Conrail had a rehabilitation program available to people with drug or alcohol problems, you never heard of it. That infers, of course, that there was a need for that drug or rehabilitation program.

So are you a part of that need? Is that what you are attesting to, and otherwise, did you observe others who need it?

Mr. CROMWELL. I observed others who would need it.

The CHAIRMAN. Have you had an alcohol problem or a drug problem?

Mr. CROMWELL. No.

The CHAIRMAN. But it stems from observing others, is that right?

Mr. CROMWELL. Yes.

The CHAIRMAN. And that is over a 14 year period working at Conrail?

Mr. CROMWELL. Yes.

The CHAIRMAN. Did you work in any other capacity other than a brakeman?

Mr. CROMWELL. I am a qualified conductor, too.

The CHAIRMAN. You are a qualified conductor, and to what extent did you operate as a conductor?

I mean, how many years? Were you so many years as a brakeman and so many years as a conductor? I am just trying to get a feel for your experience.

Mr. CROMWELL. Twelve years.

The CHAIRMAN. Twelve years as a conductor?

Mr. CROMWELL. Yes.

The CHAIRMAN. And I see then, was there a demotion involved here?

Mr. CROMWELL. No. On different jobs you will be called for different positions.

The CHAIRMAN. I see.

So you are speaking then from a 12 year experience as a conductor as well as working then as a brakeman.

Mr. CROMWELL. Yes, sir.

The CHAIRMAN. Our previous witness attested to a percentage of perhaps at the present time around 10 to 20 percent alcohol or drug usage.

Would you give us a percentage? What would be your guess, from what you observed?

Mr. CROMWELL. Well, I can give my guess as of a year ago. I would say close to 40 or 50 percent.

The CHAIRMAN. And that would be amount the same amount of, let's say, drugs as alcohol or alcohol as drugs or mostly drugs? I am trying to get a feel for it.

Mr. CROMWELL. I would say they would both be about the same.

The CHAIRMAN. And the usage would be not only in reporting but during the activity. You talked about hours of boredom, during those hours they would be stopping for a beer or smoking a joint, as they call it, or anything of that kind from your observance?

Mr. CROMWELL. Yes, sir.

The CHAIRMAN. Senator Danforth?

Senator DANFORTH. Mr. Cromwell, those who used alcohol on the job, how much would be consumed? Would it just be one or two beers, or would it be a lot?

Mr. CROMWELL. I have seen individuals consume up to a case.

Senator DANFORTH. Of beer.

How about hard liquor?

Mr. CROMWELL. Just a few incidents of a bottle, mostly beer.

Senator DANFORTH. Mostly beer. And they would drink up to a case apiece?

Mr. CROMWELL. That is about the maximum I have seen any one individual drink was a case.

Senator DANFORTH. And this would be while they were operating the train.

Mr. CROMWELL. During the course of the day on duty.

Senator DANFORTH. On duty.

What kinds of drugs did you see used?

Mr. CROMWELL. I have seen marijuana and cocaine use, and a few speed pills.

Senator DANFORTH. Was it mainly marijuana, or was it evenly distributed?

Mr. CROMWELL. Mostly marijuana.

Senator DANFORTH. Mostly marijuana.

The people that you saw using alcohol and drugs, was it clear from seeing them that they were impaired, or were they able to pretty well hide it?

Mr. CROMWELL. At times you could see some people staggering, and you seem to straighten up a little bit when you are getting ready to go sign off.

Senator DANFORTH. Are you aware of any cases where fellow employees have turned in other employees for drug or alcohol use?

Mr. CROMWELL. I have never experienced that situation.

Senator DANFORTH. How about instances when supervisors have told people that they are not impaired?

Your testimony indicates that frequently people will show up at work and they will not even see their supervisor, is that right?

Mr. CROMWELL. Yes, that is true. I have seen one incident where a supervisor knew a conductor was impaired, and told him to go climb on the caboose.

Senator DANFORTH. Go climb on the caboose. The supervisor you think knew he was impaired?

Mr. CROMWELL. He had to.

Senator DANFORTH. He had to. Why?

Mr. CROMWELL. He was slurring his words and staggering.

Senator DANFORTH. And the supervisor said what?

Mr. CROMWELL. To the effect, get up on the caboose.

Senator DANFORTH. Meaning go to work?

Mr. CROMWELL. Yes.

Senator DANFORTH. How frequently would an employee turn himself in or submit to some voluntary program of some kind?

Mr. CROMWELL. I have never seen it or witnessed it.

Senator DANFORTH. During the time that you have been in the railroad business, has it been pretty much the same during the 14 years, or is drug and alcohol use more or less used now than it was 14 years ago?

Mr. CROMWELL. In the earlier years it was more alcohol used. It was still used as of 1987 when I left.

Senator DANFORTH. So as of 1987, you still think it was 40 to 50 percent of the people who worked, that you knew who worked on the railroad who were using it with some regularity?

Mr. CROMWELL. I would say 40 or 50 percent then, but earlier it was up around 70 or 80 percent, when I first hired on.

Senator DANFORTH. When you first hired on, is it fair to say that when you first hired on, most people most of the time were consuming alcohol or drugs or both on the job?

Mr. CROMWELL. Through my experience, yes.

Senator DANFORTH. It was just the common practice, it was the thing to do.

Mr. CROMWELL. Yes.

Senator DANFORTH. I do not think I have any more questions, Mr. Chairman.

The CHAIRMAN. Senator Wilson?

Senator WILSON. Thank you, Mr. Chairman.

Mr. Cromwell, you heard me ask Mr. Gates whether or not the fact that certain employees were impaired by the use of drugs or alcohol was a fact known to their employees, and you have just told Senator Danforth that in one instance at least you personally witnessed a supervisor order a man to work though he was slurring his speech and staggering in his gait, he was ordered up on the caboose by that supervisor.

Mr. CROMWELL. Yes.

Senator WILSON. Do you know whether or not that information went higher up?

Mr. CROMWELL. I do not believe so, no. There was only a few people in the room during the incident.

Senator WILSON. All right, let me ask you this.

During your railway employment, have you been a member of a labor union?

Mr. CROMWELL. Yes, sir.

Senator WILSON. What is that union?

Mr. CROMWELL. 544 UTU.

Senator WILSON. Was there any—you have also told Senator Danforth that in your estimate, as many as 40 or 50 percent of your fellow employees were users of some form of drugs or alcohol.

Was that fact known to the officials of your union?

Mr. CROMWELL. I am really not sure there.

Senator WILSON. Well, let me put it to you this way. If it was a sufficiently widespread practice, did you ever hear in your union meetings, at the hiring hall or in any other meeting of fellow employees, discussions? There were no discussions, no admonitions ever given any of the employees who were members of the union by the union officials?

Mr. CROMWELL. No.

Senator WILSON. Was there, to your knowledge, any action taken by the union in response to what seems to have been a widespread practice of drug or alcohol abuse?

Mr. CROMWELL. No, not that I know of.

Senator WILSON. So what you are really telling us is that for a number of years there was widespread drug and alcohol abuse, and under the call system, someone who was impaired responding to a telephone call was summoned to work, and that in at least one instance—let me ask you, was it in more than one instance that you observed supervisors ordering people who were obviously, visibly under the influence of alcohol or drugs, to go to work?

Mr. CROMWELL. I just recall that one incident right off.

A lot of times during the weekends and midnight shifts you might not even see a supervisor, just talk to someone over the phone to get your orders.

Senator WILSON. Well, if it is not within your knowledge to more specifically respond to a question about the extent of knowledge either on the part of management or the union officials, if as you have told Senator Danforth, the estimated use was up to something like 40 to 50 percent, and as Mr. Gates said, at an earlier time it was up as high as 80 percent, then I have to assume that the fact of this substance abuse, this use of drugs or alcohol was well known to your fellow employees.

Mr. CROMWELL. Yes.

Senator WILSON. Was there ever any complaint by any of those who were non-users that they were subjected to danger because of the alcohol or drug abuse by their co-workers?

Mr. CROMWELL. I have never seen an incident like that.

Senator WILSON. So it was widespread, it was tolerated, and nothing much was done about it.

Mr. CROMWELL. That is right.

Senator WILSON. Were there, in the time that you have been employed doing railway work, any incidents apart from the celebrated accidents, but any lesser malfunctions in which human performance was obviously responsible that should have suggested to anybody who was a reasonable observer that there was a human failure caused by some condition that presumably was not normal?

Mr. CROMWELL. Mostly in the yards, the tracks were so old and worn that they would derail, and there would just be the track condition as the cause of the accidents.

Senator WILSON. Well, all right. You are addressing yourself now to equipment failure. I am talking about human failure, not the fact that the track was worn, but the fact that someone forgot to throw the switch, forgot to couple a car.

Mr. CROMWELL. Not that I can recall.

Senator WILSON. Thank you, Mr. Chairman.

The CHAIRMAN. Very good.

Mr. Goldstein, does Mr. Cromwell want to add anything or clarify anything?

Mr. CROMWELL. No, no, thank you.

The CHAIRMAN. Well, very good. We thank you for your willingness to appear.

Mr. GOLDSTEIN. Thank you, Mr. Chairman.

The CHAIRMAN. The next witness is Mr. Lawrence Mann, the Counsel for the Railway Labor Executives' Association. And Mr. Mann is accompanied by Daniel W. Collins, the Assistant General Secretary/Treasurer of the United Transportation Union.

STATEMENT OF LAWRENCE M. MANN, COUNSEL, RAILWAY LABOR EXECUTIVES' ASSOCIATION; ACCOMPANIED BY DANIEL W. COLLINS, JR., ASSISTANT GENERAL SECRETARY/TREASURER, UNITED TRANSPORTATION UNION

Mr. MANN. Mr. Chairman, we feel like the Lone Ranger here this morning, but I want to give you our position the best that we can on this very difficult problem.

Some of you have painted rail labor as cold-blooded culprits and that is just not the case. We have sincere compassion and sorrow for everyone who has been the victim of alcohol or drug use in the railroad industry. I am still not going to apologize for defending the rights of the rail workers or for defending the constitutional rights that they may have. The constitutional principles are very dear to us, and we are not going to minimize them in any way, in any forum, Congress nor the courts.

With that background, I would like to point out to you that there is indeed a program in existence in the railroad industry which is working. It is on the CSX Corporation, which is the largest railroad in the country. An agreement is in effect with the Brotherhood of Locomotive Engineers, the United Transportation Union, and more recently, two other unions have also agreed to the principles set forth in that program. Let me explain the agreement a little bit.

It incorporates virtually all of the testing that is now being conducted in the country except for random testing. However, that is only one aspect of the program. Included is a very effective Operation Red Block program which you have heard about this morning. The program builds in prevention and education, and the statistics bear it out that it has been effective.

The CSX system today is virtually drug and alcohol-free, and we attribute it to the agreement, because prior to that time there was significant usage on the railroad. When you compare the statistics resulting from the CSX Corporation agreement being in effect with the Federal Railroad Administration's rule, the CSX program is far superior. You heard Mr. Riley state there was about 5 to 6 percent positive tests last year. Well, on the CSX system for the same period of time, there was approximately 3 percent.

We are not saying to you that any percentage is an adequate threshold. There should be no usage of alcohol and drugs in the railroad industry. But I am pointing out to you that there is a program which is working, and the unions have embraced it. You are not faced with a situation on CSX where a co-worker is reluctant to turn in another co-worker because they know that the that co-worker will be treated with rehabilitation, counseling and every other effective means that is known today to cure any problem which might exist from alcohol or drug testing.

Senator Danforth asked four questions of Mr. Riley, one being the Ninth Circuit decision. Well, I am not going to debate the Ninth Circuit decision. I am handling that litigation, and I am going to defend that litigation in the Supreme Court, Senator. We have different views on it, and I recognize that, but I suggest that reasonable men can differ on the protections of the Fourth Amendment.

I want to talk very briefly about the accuracy of the drug tests. Even if you take the highest quality test that is in existence today, which is the GCMS type test, your random testing legislation does not mandate that there be a GCMS test. All you are requiring is a confirmation by a highly scientifically reliable test.

Well, I suggest to you that the manufacturers of the EMIT test would tell you that they have got a good, high, scientifically qualified test. If you are going to mandate this kind of confirmation testing, it should be the most reliable test that exists.

We know that there are errors, and there will probably be errors in the future, no matter what kind of tests are conducted, because not only do you have the mechanism of the physical test itself, but you have humans reading the tests and performing the tests. You are going to have human error, which is common, but you have to do the best you can to mitigate against that error, and I suggest that you have nWnd we have discussed this with your staffs, and we continue to discuss it with the staffs on what might be done to help that problem.

Now, with respect to impairment, there is no dispute in the industry, as I understand it, anyway, that you cannot determine when a person is impaired for drug usage. I have heard comments, that then there should be nothing but a trace. Well, I just wonder if alcohol metabolized the same way as marijuana, would the Members of Congress make the same statement. If alcohol stayed in the system up to a month and if you tested positive, you could no longer be a Member of Congress, you might have a different perspective on the Fourth Amendment.

We are not trying politically to defeat alcohol and drug testing. We want something done in the alcohol and drug testing arena, and we are working damned hard to get it done because the finger is being pointed at rail labor, no one else. I hope that you would take a real hard, determined look at what is happening on the CSX system.

Thank you very much. I think Mr. Collins has a few comments.

[The statement follows:]

STATEMENT OF LAWRENCE M, MANN. RAILWAY LABOR EXECUTIVES ASSOCIATION

My name is Lawrence M. Mann. I am the attorney for RLEA in this matter. The RLEA represents all the crafts of the railroad workers in this country, and the names of constituent organizations are as follows:

American Railway & Airway Supervisors Association, Division of BRAC.
American Train Dispatchers Association.
Brotherhood of Maintenance of Way Employees.
Brotherhood of Railroad Signalmen.
Brotherhood of Railway Carmen, Division of TCU.
Transportation Communications Union.
Brotherhood of Locomotive Engineers.
Hotel Employees & Restaurant Employees International Union.
International Association of Machinists & Aerospace Workers.
International Brotherhood of Boilermakers & Blacksmiths.
International Brotherhood of Electrical Workers.
International Brotherhood of Firemen & Oilers.
International Longshoremen's Association.
National Marine Engineers Beneficial Association.
Railroad Yardmasters of America, Department UTU.
United Transportation Union.
Sheet Metal Workers International Association.
Seafarers International Union of North America.
Transport Workers Union of America.

A front page headline in last Sunday's *Washington Post* read "Results Show Federal Drug Testing Not Fail-Safe." It discussed an example of a false positive drug test which was conducted on an air traffic controller by one of the most highly regarded testing laboratories in the country. But for the close relationship between the supervisor and the employee involved, the employee would have been walking the streets today looking for other employment. The false test demonstrates the fallibility of the drug testing system in this country-errors are made even by reliable laboratories, as evidenced by the startling revelations surrounding the CAMI laboratory. Moreover, even if the tests are accurate, none can determine whether, in fact, a person is impaired. (*See e.g.* 11 Nova L. Rev. (Winter 1987)). The literature is replete with references to the unreliability of drug testing results. To draw a conclusion that one is impaired based upon an analysis of a metabolite in urine is unscientific and irresponsible.

Since the hearing is directed at current developments in drug and alcohol testing, I will mention the recent Ninth Circuit Court of Appeals decision in *Railway Labor Executives Association, et al.* v. *Burnley,* et al., and its impact on the Government's drug testing program. As you know by now, the court held that drug and alcohol testing in the railroad industry may be conducted only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment. While the fat lady has not yet sung, rail labor feels strongly that the heavy-handed approach by the FRA is unconstitutional. The rules are overly broad and inadequately protect the integrity of the testing procedures. As we have explained to your Committee in several past hearings, rail labor is not opposed to the concept of employee testing so long as adequate safeguards are provided. Some of these safeguards include, but are not limited to: (1) the requirement that only certified laboratories could test, (2) verified test results by the most scientifically reliable tests available, (3) setting reasonable threshold levels below which the results would be negative, (4) passive participants in events shall not be tested, (5) the employee being given a portion of the sample in a sealed container so that another independent laboratory can verify the test results at the employees expense, (6) no laboratory being allowed to perform tests where blind proficiency testing of the laboratory shows it has committed errors, and (7) mandatory Operation Red Block and Employee Assistance Programs. The FRA regulations do not contain these protections. Furthermore, the rules give the railroads "carte blanche" to perform whatever testing they wish without proper scrutiny of procedures. I might add that some railroads utilize poor quality labs and tests are not confirmed. Mandating random testing such as that provided in S. 1041 would do nothing more than exacerbate a program already filled with questionable testing practices. In short, the current testing of railroad workers would still be woefully deficient even if the Supreme Court were to rule that the FRA regulations are constitutional. Incidentally, rail labor's court challenge to the FRA rules has nothing whatever to do with its commitment to eliminate alcohol and drug use on the railroads.

Rail labor's ongoing effort to embrace a reasonable testing program is demonstrated by the agreement between the CSX Corporation, the nation's largest railroad with the Brotherhood of Locomotive Engineers, the United Transportation Union, and recently with the Brotherhood of Railroad Signalmen and the American Train Dispatchers Association. Since the agreement became effective the accidents allegedly caused by alcohol and drugs have decreased significantly.

Our understanding is that last year on the CSX only about 3 percent tested positive, which is much better than the FRA's results for mandatory testing. We do not have specific figures from CSX because of the confidentiality of the testing. The general consensus is that CSX is virtually alcohol and drug free today. The reasons why CSX has a better record is obvious to rail labor. Unlike the case on most railroads, both the CSX and labor have adopted a comprehensive approach to the problem which includes adequate safeguards for the tests. Operation Red Block, a thorough training program for supervisors, and a fully staffed employee assistance program. The railroad has a partnership with the unions agreeing to work together to eradicate the problem. This is contrary to the approach sought by some members of Congress, the FRA and the AAR. Irrespective of the outcome in the courts over toxicological testing, all testing on the CSX will continue in effect because the rail unions have agreed to the testing.

In conclusion S.1041 is not the way to eradicate alcohol and drug use in the railroad industry. We urge you to give the CSX Agreement with the rail unions a chance to demonstrate that it represents a model testing program for curtailing drug and alcohol use in the nation's rail work place.

The CHAIRMAN. Mr. Collins?

Mr. COLLINS. Mr. Chairman, Senators, I am a railroad man for 46 years. My father was a railroad man for 52 years. So we have been in the rail industry throughout the whole of the twentieth century. I have a son and a son-in-law that are in railroading.

I know much about this problem from that railroad background. I would like to say that for the past 18 years have spent most of my time as a union officer trying to build in this country financially sound, professionally administered, jointly supported employee assistance programs backed with the concept of prevention that is inherent in an Operation Red Block program, to try to deal with this problem in the rail industry.

Now, in 1977 and 1978 we conducted a two-year study in the rail industry on problem drinking among rail workers, extent, impact and solutions. That report, that monograph of that report was done in conjunction with the Federal Railroad Administration, with the rail industry and with rail labor. Now, we spent two years on seven railroads comprising roughly 235,000 people, operating, non-operating and exempts. And we found what we were looking for, what the extent of the problem was in the rail industry, the conclusions we reached from the study, and the recommendations that we made to the Federal Government, to the industry and to rail labor.

I sit here today and tell you, had the recommendations of that study, financed by this government, been taken into view, many of the problems that we have today when it comes to addressing this problem would not be in existence.

I have been instrumental in working to develop at least 45 employee assistance programs in this country on railroads on both sides of the border, in Canada and the United States. Now, I know from my experience with those railroads who have accepted the precepts of this

report and have put in place the type of programs that were necessary, that were backed with Red Block prevention type programs, the results of those efforts.

The Federal Railroad Administration, for example, requires three hours of study or three hours of training for a supervisor when it comes to detecting substance abuse amongst the rail workers. We have trained 5,000 rail workers on the CSX and on the Union Pacific and on the Burlington Northern and prevention teams that takes at least two days of training that is paid for completely by the carriers.

Now, al I am suggesting is that for 100 years in the rail industry, the concept of Rule G, which by the way, was the most rigid rule that you could find in any industry, has not worked and has not worked successfully because the rule lacked implementation across systems and across railroads. There was never any strict adherence to a rigid application of Rule G because it depended upon where you are at, the division you work for, the attitudes of the superintendents that was in charge of the division, et cetera.

Your rules, the Federal rules which were set in motion through the Federal Railroad Administration also lack, as I see it, that kind of enforcement that could come better from the involvement of people out there impacted by this problem who live and work in this hazardous occupation.

I see that from random testing or from the concept of random testing—and I am not going to become involved in the legal aspects of it. That is not my point. My point is what we fear with mandatory testing is that if developed, it will jeopardize the work that we have done to date in promoting the concept of prevention and the involvement of people in the Red Block programs because we do not think that under the circumstances, utilizing the harassment that has come within the industry over mandatory testing is very conducive to trying to get this kind of support that is necessary to promote these programs.

Conrail, if we go to Conrail, we have been trying for years to develop on Conrail the principles of Operation Red Block; contrary to what Mr. Gates and what Mr. Cromwell have said, Conrail has had a program. It has had an employee assistance program for at least 14 years. It has been in place.

To verify the results of what has happened in Conrail's employee assistance programs, you had better go to the director of the program, John Gorman, who could give you better statistics on the educational aspects of what they have been attempting to do to promote these kinds of programs within Conrail. But I know, as I say, that we feel that if the industry would accept some of the principles that we put forth originally, we told the Federal Railroad Administration one of the things you should do when you set your rules in motion is first to insist upon standards within employee assistance programs. You have employee assistance programs in this country that are not adequate to meet the needs of rail workers. They are not financially sound, and they are not jointly supported.

Secondly, when you begin to deal with the questions of testing, you had better take a look at the need for some kind of regulatory control over the lab sites where the testing is being done. Most of the problems that we have today and have had to date with testing go back to the problems that have developed at the lab sites over confidentiality, chain of custody, the technicians, the qualifications of technicians, the technology, the equipment that is being utilized, best evidenced by the fact that the government itself had to give up on CAMI.

Why was the same investigation not made of CAMI before it was utilized as a testing site as was made after they found that the director of the program was incapable of performing it? What assurances do we have, for example, that the University of Utah is going to produce any better results?

At least on the CSX we have one of the best applications of the protection for testing that is known. We have double blind testing. We have a third lab site which spikes its own tests, spikes its own samples and mixes them with CSX, sends them to the lab site. They come back, and they go back to the third party, the lab site where the testing is being done in order to check to see that those tests come back the same way they were spiked.

You have asked the question of voluntarism, does it work? It works. You asked whether co-workers' referrals will work. They work where there is a protection of this type of program.

So I say that if we want to approach this in a way that will be far more successful than what we have had to date, then we should move as much as we can within that concept of EAP's Operation Red Block, coupled together with the testing agreements that we have off the CSX.

And under those circumstances, I think that we would approach this problem far more successfully than we have to date.

[The statement follows:]

STATEMENT OF DANIEL W. COLLINS, JR., ASSISTANT GENERAL SECRETARY-TREASURER, UNITED TRANSPORTATION UNION

Today, we are embroiled in a legal battle within our courts over a rule designed to solve the alcohol and drug abuse problem within the railroad industry. Toxicological testing performed after accidents, fatalities and incidents that trigger the authority for testing can be a useful tool in helping address the human problem of substance use and abuse.

The legal war in which we find ourselves today is certainly unnecessary and can readily be made moot. The FRA rule, as it stands, contains unacceptable conditions for railroad labor, as it is the individual employees who suffer the consequences of errors, improper authorization, negligence, etc., all of which we refer to as rule abuse.

On February 8, 1987, in an FRA hearing on this rule and through numerous pieces of correspondence, the railroad labor organizations have complained and asked Mr. John Riley, FRA Administrator, to correct and amend the rule. All of this has been to no avail. Some simple amendments, safeguards and mandatory quality control in the laboratories would readily have labor endorsing and supporting the FRA's Toxicological Testing Rule.

As a demonstration of our sincerity in addressing the testing issue as a legitimate tool in dealing with alcohol and drug use and abuse, the United Transportation Union (UTU) and the CSX Railroad (the largest U. S. railroad) entered into a testing agreement. This agreement is far more comprehensive than the FRA rule and contains safeguards, quality control and other provisions that prohibit the mental rape of the workers we represent.

For example, the CSX testing agreement requires that each person subjected to testing is to be provided with a TESTING CONTROL FORM. This form is easy to prepare and it cites the authority under which the person is being tested. It lists the type of tests that will be required, gives an opportunity to provide a voluntary blood sample if not already mandated, notes the name and address of the institution collecting the samples, and allows a person to list prescribed and over-the-counter medications taken within the last 60 days. This document also provides the testee with an opportunity to describe any circumstances he/she deems relevant to the entire process. See Appendix A. [1]

Requiring such documentation is comparable to providing a legal search warrant to enter a person's home. A police search of someone's premises is certainly not as intrusive as a chemical search of a person's body fluids and asking for documentation of the authority for granting such action is not unreasonable.

Actually, one of the major reasons railroad labor has sought such a document is that the railroads have continuously abused the FRA testing authority, either willfully or negligently, by illegally coercing people into providing urine and blood. When we, as the employees' representative, complain about such rule abuse, the FRA has a standard canned response: "The FRA Rule neither prohibits nor allows toxicological testing in this particular incident, therefore, you have a labor-management problem and you should seek remedy under the Railway Labor Act."

Mr. Riley has personally agreed that it would be beneficial to his agency if the railroads were required to cite the authority on such a form, as it would readily alleviate the dispute we get into as to whether the railroad tested a worker under the auspices of the rule. If the carrier designates FRA authority on a TEST CONTROL FORM and FRA determines it was not allowed, then corrective action can be taken. Essentially, as it exists today, the FRA has granted the railroads testing authority, which the carriers abuse, and the FRA sheds all responsibility for such misuse.

This is equivalent to a city providing firearms to its police force, but not shouldering the responsibility for any weapon misuse.

Railroad labor has called upon the FRA to assure us that the laboratories analyzing the body fluids of our members are reputable and reliable. There is only one way to prove this and that is to subject the analyzing labs to double or triple blind tests, not once, but on a continuous basis. Mr. Riley was asked about this on February 18, 1987 with respect to the Civil Aeromedical Institute (CAMI) laboratory and his response was that he would answer the inquiry later. Check the FRA record on this hearing [FRA Docket No. RSOR-6, Notice No. 15].

Indeed, Mr. Riley responded with respect to his monitoring of quality control at CAMI. Unfortunately, it was in the WASHINGTON POST and almost every other major newspaper throughout the United States, after CAMI's credibility blew up in the FRA's face.

With this type of irresponsibility on Mr. Riley's part, the FRA and its laboratory oversight procedures with respect to blind quality control, chain of custody, lab credibility, technician qualifications, cross reactivity, false positives, and discrimination and harassment with regard to testing, has made the entire procedure a farce. We are not willing to gamble with each individual worker's reputation, future, career, livelihood, family and income every time his/her urine sample goes forward to a laboratory in which we have no assurances or safeguards.

What corrective procedures has Mr. Riley taken to assure us that the CAMI fiasco will not be duplicated at the University of Utah? And what about the FRA-authorized testing samples that the railroads send to various laboratories? What requirements or quality control safeguards have these company-contracted labs had to meet in order to assure credibility? None, under the FRA rule.

In the UTU-CSX testing agreement, we have a continuous quality control program taking place in which the sample-analyzing laboratories are subjected to double blind testing. The findings on scientifically-spiked samples are compared to the known ingredients and discrepancies are immediately corrected. Both labor and management find out the results of the quality control tests at the same time.

---

[1] The appendix was not reproducible.

The FRA could easily follow suit requiring similar assurances not only to protect railroad workers, but for the agency's credibility as well.

Railroad labor has legally fended off one company's egregious action of dog searches. The production of evidence revealed that this particular carrier, in its search of employees' personal belongings, discovered the type of contraceptive a female locomotive engineer was using. This is alarming. What other personal information would a carrier collect if it had the opportunity?

The FRA rule does not prohibit railroads from having their contracted laboratories biologically snoop in the body fluid samples they acquire under the authority of the rule. This may seem amusing to some, but causes great concern to this labor organization. There is no law forbidding a look to see if a worker is pregnant, has AIDS, check out a person's genetic makeup, etc.

Mr. Riley was asked about forbidding chemical investigations beyond the intent of the FRA rule. The response one gets is, "Do you know of anyone doing this?" In the representation business, as with alcohol and drugs, PREVENTION is always the best solution. What would it take to add a clause to the rule absolutely forbidding biological snooping?

In the CSX testing agreement when reasonable suspicion or probable cause is determined, the worker is removed from service and held out until his/her test results are known.

The FRA rule uses triggering mechanisms to indicate probable cause but does not require the railroads to remove these people from service. There are three classic examples:

1. A crew en route will stop and pick up cars and become involved in a minor accident or rule violation. The railroad manager will tell them to couple up the train, they complete their trip and are then subjected to testing for probable cause. This happens 150 miles down the road. If there is cause to test someone, should they be allowed to continue to operate a train on the mainline? Isn't this ludicrous?

2. Same scenario as above, but the railroad will grab the crew at the time of the incident, test them for cause, put them back on the train without knowing the test results, and away they go. If there was cause to test these people, isn't it crazy to put them back on a train not knowing what is wrong with them?

3. Same scenario as number one, but no tests are performed because the crew is a management pet, it is not financially practical, or the railroad has no officer available to handle the situation.

What is the intent of the FRA rule? To provide permission to test at the optimal time financially or to address safety?

The UTU has file drawers loaded with letters and formal complaints lodged with the FRA over rule abuse situations, many dating back a year or more, with no response.

Random testing as proposed by the FRA and our Congress is one of the most expensive and ineffective means of addressing the problem we face. For example, if we knew 5% of the work force was using mind-altering substances and we could possibly test 2% of all workers on any given day, the chances of detecting one user is 1 out of 1,000. With the accuracy of today's laboratories, we would falsely accuse 50 to 100 people out of every thousand we test of being drug users.

The Department of Transportation is currently conducting random testing amongst its employees. What are the findings and what are the costs?

When random testing is instituted in the workplace, the addicted or troubled user will continue to work until detected. These people cannot be deterred by any other means than through actual confrontation.

A far more accurate method of detection in the workplace is the fellow workers. They know who is using, what they are using, and to what degree. Recruiting nonusing and recovering employees into active PREVENTION programs such as Operation Red Block immediately places a positive and most effective net in the workplace.

Drug testing should be instituted along with a PREVENTION program in a compatible fashion so as not to destroy the PREVENTION concept, but to complement it. Testing performed within reasonable parameters can effectively monitor the workplace and serve simultaneously as a deterrent to those who can be deterred—not the addicted, but the occasional users.

A blatant random program or the police penal approach is totally ineffective in addressing the problem. It may appear as if we are doing something about the problem and, if instituted, it will cost lives, limbs, money, futures, careers, and people's livelihoods as we prove its ineffectiveness.

The CHAIRMAN. Very good, sir.

Mr. Mann, I of course take it you are a practicing attorney.

What experience, if any, have you had with the railroad on this operation?

Mr. MANN. Senator, I gave been involved in railroad safety for approximately 20 years.

The CHAIRMAN. Have you worked for the railroad? Did you ever run a train, ever been a conductor?

Mr. MANN. No, sir.

The CHAIRMAN. I am trying to get experience.

Mr. MANN. No, sir.

The CHAIRMAN. None at all.

Mr. MANN. I am an attorney.

The CHAIRMAN. As an attorney. Well, good.

You are a good attorney. I practice it myself. The constitutional right of employees, and then you said it is working, there is no problem, Operation Red Block is working, and there was no reluctance to turn in any other co-worker, and under the Fourth Amendment you agreed with the Circuit Court in its recent decision giving more protection to a horse race than the human race, and about impairment, you could not tell about it anyway, and by the way, you were not trying to defeat drug testing.

If I had followed you closely, I would have been confused.

Mr. MANN. Well, Senator, the proof of the pudding is the CSX agreement. Rail labor has endorsed testing, and it has endorsed every aspect of testing but random, with protections built in, which your bill does not contain.

The CHAIRMAN. Well, let's go to the hard evidence because you gave none; you gave opinions, because you, like me, we have not operated a railroad, we are just both lawyers.

Now, Mr. Collins, you gave good testimony. You said you have been in the works for 42 years, you worked on 45 programs, and none of them have worked because the last 13 months we have killed 39, we have maimed and injured 341 and caused $20 million worth of damage. So like Edison found for the electric light, he found 3,000 ways it did not work. We have found 45 programs that do not work.

Mr. COLLINS. Pardon me, Senator, but in most of those cases where those problems developed, Operation Red Block did not exist.

Now, I have some statistics off a railroad like the Union Pacific, if you want to hear them, which goes to the question of whether or not co-worker referral, companion agreements, voluntary admission into programs takes place. It does.

The CHAIRMAN. Well, of course, we have heard both your testimony on the Conrail employee assistance program, and we have seen the Conrail employees, and we have heard what they have had to say.

Senator Danforth?

Senator DANFORTH. Mr. Mann, you do not object to drug testing except random testing, is that right?

Mr. MANN. That is correct.

Senator DANFORTH. Is random testing less accurate than other drug testing?

Mr. MANN. Less accurate?

Senator DANFORTH. Yes.

Mr. MANN. The physical test? I do not know that it is less accurate. I think they both have the same deficiencies.

Senator DANFORTH. What kind of testing are you for, periodic?

Mr. MANN. The Brotherhood of Locomotive Engineers and the United Transportation Union have agreed to pre-employment, post-accident, periodic and reasonable cause.

Senator DANFORTH. Let's take periodic testing. Is that accurate?

Mr. MANN. Senator, it is not a question of what triggers the test whether it is accurate or not. The accuracy is a different aspect.

Senator DANFORTH. Are you for or against periodic drug testing?

Mr. MANN. Per se? Not without adequate protections. Rail labor is not for any testing without proper protections built in.

Senator DANFORTH. Are you for or against periodic drug testing?

Mr. MANN. Only with proper protections.

Senator DANFORTH. Well, is there periodic drug testing which is accurate?

Mr. MANN. The accuracy does not change whether it is periodic, post-accident or pre-employment.

Senator DANFORTH. I do not understand why you are for any drug testing if you do not think it is accurate.

Mr. MANN. Because there are protections built in that would help reduce or minimize the inaccuracies.

Senator DANFORTH. Name them.

Mr. MANN. Well, one is you would have blind testing of laboratories that perform the tests.That is, taking known samples and sending them to these laboratories. If they fail in that proficiency testing, they could not perform the tests anymore. That protection is nonexistent except on the CSX. We do not have a drug and alcohol problem on the CSX.

Senator DANFORTH. Does the CSX not use the same laboratory that the air traffic controllers use?

Mr. MANN. I cannot answer that. I don't know.

Senator DANFORTH. True. Compuchem?

Mr. MANN. Compuchem.

Senator DANFORTH. Compuchem.

Mr. MANN. A qualified laboratory.

Senator DANFORTH. It is?

Mr. MANN. They make mistakes.

Senator DANFORTH. Do you vouch for it?

Mr. MANN. I pointed out that they make mistakes.

Senator DANFORTH. Accurate?

Mr. MANN. And the air traffic controller was a good example, and that is what we are talking about. There are errors.

Senator DANFORTH. It is your laboratory. The one that you are here saying is a good laboratory.

Mr. MANN. But, there are built in protections which is not in your legislation, Senator.

Senator DANFORTH. Well, name them.

Mr. MANN. Well, I named that one. Another one would———

Senator DANFORTH. Well, you vouched for a specific laboratory that the air traffic controllers use. Name the protection.

Mr. MANN. I vouched for protection irrespective of what the laboratory may be.

Senator DANFORTH. What protections would you like to see in the legislation? Maybe we can do business.

Mr. MANN. Well, I pointed some out in the testimony.

Senator DANFORTH. What?

Mr. MANN. Have Operation Red Block mandated, have any———

Senator DANFORTH. Is Operation Red Block a protection?

Mr. MANN. Yes, sir.

Senator DANFORTH. Again inaccurate testing?

Mr. MANN. You cannot distinguish between and separate, Senator, just testing from the whole ball of wax. We have got———

Senator DANFORTH. Well, I am interested in testing.

Mr. MANN. Okay.

Senator DANFORTH. And I am interested in your distinction between random testing and periodic testing.

Now, you are the one who says that you favor periodic testing but not random, and I am saying what is the difference?

And you are challenging the accuracy of random testing, and I want you to tell me the distinction in accuracy between random testing and periodic testing.

Mr. MANN. The distinction is broader than you would like to hear because———

Senator DANFORTH. I would like to hear any distinction you would care to tell me between random and mandatory testing on the basis of accuracy.

Mr. MANN. Well, on the basis of accuracy per se———

Senator DANFORTH. Yes, sir.

Mr. MANN. I do not think there is.

Senator DANFORTH. There is no difference.

Mr. MANN. No.

Senator DANFORTH. Now, does your union favor periodic testing?

Mr. MANN. Not per se.

Senator DANFORTH. What do you mean not per se? Do you favor periodic testing?

Mr. MANN. Senator, there have to be built in protections with the testing.

Senator DANFORTH. Tell me the protections you would like built in.

Mr. MANN. I thought I have outlined some of them.

Senator DANFORTH. No, you have not. You have not drawn any distinction whatever between random testing and periodic testing. You have stated this doctrine of opposing random testing but not opposing periodic testing, and I want to know what the difference is.

Mr. MANN. First, there is a constitutional basis. That is our first objection, and it is a main objection, as you know from the court case.

Senator DANFORTH. Why? No, I do not know that from the court case.

Did the court case—this crazy Ninth Circuit case—did it not hold that testing after an accident was unconstitutional?

Mr. MANN. It did.

Senator DANFORTH. Do you favor testing after accidents?

Mr. MANN. Only if there are protections built in will the unions favor testing.

Senator DANFORTH. You have taken the position that you favor testing after accidents.

Mr. MANN. Correct, and there is a difference———

Senator DANFORTH. And you have taken the position that you favor testing on a periodic basis, and you take the position that you do not favor random testing, and I submit to you that there is no logical reason why you can say that random testing is less accurate than periodic testing.

Mr. MANN. It is not less accurate in the physical test itself.

Senator DANFORTH. All right. Then why do you oppose random testing?

Mr. MANN. On constitutional grounds, primarily.

Senator DANFORTH. Well, you opposed testing after accidents on constitutional grounds. You are in court on it.

Mr. MANN. We opposed the FRA rule because it was overly broad, it did not have constitutional protections built in.

Senator DANFORTH. Did you argue that case in court?

Mr. MANN. I did.

Senator DANFORTH. Did you not argue the case in court that FRA regulations do not have anything to do with people, it has to do with equipment?

Mr. MANN. Well, I did not argue that at all.

Senator DANFORTH. Well, is that not what the court held?

Mr. MANN. Well, I did—you asked me what I argued.

Senator DANFORTH. Is that what the court held?

Mr. MANN. The court held that there must be reasonable suspicion that a person is impaired before you can test him.

Senator DANFORTH. Did the court not hold that the purpose of the FRA regulations did not go to the performance of people but went instead to the operation of equipment and rails?

Mr. MANN. That was one aspect of the reasoning, that the statute does not cover employees, and that was one of the bases that the court ruled———

Senator DANFORTH. You argued you did not want testing for employees.

Mr. MANN. I argued that the FRA rule was unconstitutional. The court agreed. And I pointed out to the court there was a reasonable method—that method was the CSX agreement because it had the built-in protections to minimize one's constitutional rights being violated.

Senator DANFORTH. Does the CSX rule not prevent any employee from ever being disciplined who tests positive?

Mr. MANN. No.

Senator DANFORTH. It does not?

Mr. MANN. No.

Senator DANFORTH. Does it not provide that employees cannot be disciplined even who test positive for repeated drug failures in the work place?

Mr. MANN. No, that is just not true.

Senator DANFORTH. It is not true.

Mr. MANN. No.

Senator DANFORTH. Does the CSX testing program preclude testing for running stop signals?

Mr. MANN. No.

Senator DANFORTH. You can, if you run a stop signal, you can be tested under the CSX?

Mr. MANN. You can be tested for rule violations.

Senator DANFORTH. That is not my understanding.

Mr. MANN. Well, I have a copy of the agreement. I will be happy to leave it with the committee.

Senator DANFORTH. Does the CSX rule prevent periodic physical testing for drugs and alcohol?

Mr. MANN. No.

Senator DANFORTH. It does not?

Mr. MANN. No.

Senator DANFORTH. All this information I have is erroneous then.

Mr. MANN. It certainly is.

Senator DANFORTH. Is it premised, is the existence of the CSX agreement premised, on the understanding that should a random testing program be implemented, the CSX agreement would terminate?

Mr. MANN. No.

Senator DANFORTH. That is wrong, too.

Every piece of information I have received was wrong then.

All right, well, I will find out about that.

Mr. MANN. Senator, if I may, I will lodge the agreement with the committee.

Senator DANFORTH. All right.

Mr. Riley at some point might like to respond to these points.

Mr. RILEY. I would be glad to retake the stand to respond to that.

Senator DANFORTH. Your position, Mr. Mann, is, a I understand it, that this legislation is not going to see the light of day so long as random testing is part of it, right? that is the position that you are taking?

Mr. MANN. We oppose random testing, Senator.

Senator DANFORTH. And that the bill should be killed with random testing.

Mr. MANN. Yes, sir.

Senator DANFORTH. Mr. Collins, does the testimony that has been presented today that in years past 70 to 80 percent of rail employees were regular users on the job of alcohol and drugs comport with your experience?

Mr. COLLINS. It has never been true in the history of the industry, Senator.

Senator DANFORTH. How about 10 percent, 20 percent, 30 percent, 40 percent, other figures we have heard today?

Mr. COLLINS. Well, I would have to say, in this study here itself, this would indicate that 90 percent of the people in the rail industry do not use or condone the use of drugs.

Senator DANFORTH. What is your personal experience?

Mr. COLLINS. My personal experience? Of course, it is going to vary from railroad to railroad, but my own railroad experience probably would be somewhere in the neighborhood of what the national average is, about 10 percent, the same as it might be down here in Washington.

Senator DANFORTH. About 10 percent?

Mr. COLLINS. Right.

Senator DANFORTH. On the job.

Mr. COLLINS. I would not say 10 percent on the job.

Senator DANFORTH. What percent on the job?

Mr. COLLINS. I would say 10 percent of the people maybe on duty or subject to call. There is a difference there.

One of the problems we have is with subject to call drinking, that people are available 24 hours a day.

Senator DANFORTH. DId you ever see anybody consume a case of beer on the job?

Mr. COLLINS. Never, never.

Senator DANFORTH. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Wilson.

Senator WILSON. Thank you, Mr. Chairman.

Mr. Chairman, first I would commend those that conceived and put into effect the Red Block program. I think is a good program as far as it goes.

It is obvious that we have got a problem here or you would never have undertaken the Red Block program. That was true in advance of these celebrated horror stories that have been the focal point of the testimony that we have had here today. So we can argue about the extent of the problem, but it obviously exists to a degree that has caused great concern on the part of your union, Mr. Collins, and on the part of the parents, the relatives of the victims of the crashes that have appeared here today.

Let's try and cut through this.

Mr. Mann, you have indicated that your response to what we are seeking to do here would be to mandate Red Block.

Mr. MANN. Yes, sir.

Senator WILSON. your objection, then, is to random testing. That is clear. It is not entirely clear, I think, for the record why you object, and at the risk of belaboring the obvious, I would ask you why it is that you either individually or in your capacity as representing your client, are opposed to random testing, and draw the distinction between that and the other forms of testing.

Mr. MANN. Well, Senator, first of all, I as the attorney for rail labor, I do not make policy decisions at all, and I am reflecting the policy of the entire Railway Labor Executives' Association. They have taken the position that they will agree to some forms of testing, i.e., post-accident testing———

Senator WILSON. But why not random testing?

Mr. MANN. Well, they are concerned about several things. One is the whole attitude problem that you have. You are not going to solve this problem, Senator, I suggest by hammering it into the rail industry. It has got to be a cooperative type program, and if you hammer random testing down the throats of rail workers, it is the strong, strong feeling of rail labor, it is just never going to work. The other method which we have in existence on the CSX is working. Give it a chance to work. Mandate it nationwide and see if it works. If it does not work, then there is an alternative.

Senator WILSON. All right, let me pursue this with you.

Let me ask in a different way what may seem to you to be the same question.

What precise right is it that you or the railway executives whom you represent, feel to be violated by random testing?

Mr. MANN. The right is the protection against unreasonable searches and seizures without probable cause. That is the specific right.

Senator WILSON. All right, if that is the right, then I think we would acknowledge that one court, the Ninth Circuit, has agreed with you and seven others have not.

Let's get to a more practical way of trying to measure this.

What is the consequence to the railway employee who undergoes random testing and is found to be impaired by drugs or alcohol?

Mr. MANN. It depends on the railroad, Senator, but let's take CSX as the model program. First, they go into a rehabilitation program. At the point that the counselor, the medical staff of the railroad, determines that that employee has been rehabilitated, they in the first instance will permit that employee to go back to work.

Senator WILSON. Well, that is hardly an unfortunate consequence.

Mr. MANN. Well, in the meantime he is not working or getting paid.

Senator WILSON. So what your concern is, then, is protecting the employment.

Mr. MANN. That is one concern, sure. The other is to get that employee off the railroad who has the lack of insight to use alcohol or drugs while working.

Senator WILSON. Both of those are commendable objectives——

Mr. MANN. Sure.

Senator WILSON. But let me just ask you this. To get right to the nub of the thing, no one is arguing that you are right in seeking to remove that employee who is impaired in his performance. No one is even taking issue with the concern that you have for him or his family if, during the period that he undergoes treatment or rehabilitation, he is not working, and I gather from what you are saying, therefore, is losing the benefits of his employment, is that true?

Mr. MANN. Correct.

Senator WILSON. I understand that, but let me just ask you, is the right to continue with employment, though impaired to the extent that you imperil the lives of others, a right that you feel to outweigh the right of the traveling public to travel in safety?

Mr. MANN. No, sir. You are suggesting to us that we feel that a person who is impaired should be out there operating a train. That is just not so.

Senator WILSON. But, Mr. Mann, that is, if you will permit me to say so, a position which you say you do not take, and yet, if random testing as this committee believes is the only way that you can deal with the problem of impairment, then I think that that position of yours is at least or at best, I should say, wishful thinking.

I would tell you that I think Red Block is fine as far as it goes. It is aimed at prevention.

Mr. MANN. It sure is.

Senator WILSON. Wonderful. We have no argument.

Mr. MANN. That is what random is directed at.

Senator WILSON. Precisely. Random is directed at preventing harm.

Is it not infinitely better for the employee as well as everyone else, and certainly those whose safety he imperils, to determine that in advance so that he is not guilty of the kind of conduct that can cause the anguish, the heartbreak and the outrage that we have heard here today?

Mr. MANN. Senator, we have the same objective, obviously. It is just that we differ in the method of how do you accomplish it.

Senator WILSON. That is right.

Mr. MANN. And we are pointing out to you, Senator, that the alternative way is working out there on the railroad, on the CSX. That railroad is virtually alcohol and drug free. Do not get me wrong, there are some instances, but basically when you compare it with the rest of the system, they are alcohol and drug free.

Senator WILSON. Mr. Mann, you have heard we commend the Red Block system, and I am sincere in that. I am sincere in my praise for those that recognized a serious problem and sought to deal with it. I am not faulting them for that initiative, but what I do say is that there is no way that you or anyone else concerned with that program can be certain that a voluntary program is in fact going to be 100 percent effective, and I must tell you that that is what we are aiming at, 100 percent effectiveness, because one of these accidents is too many.

Now, let me just say that short of random testing, there is no way that we can be certain that someone with that problem does not one night get the call, go to work with no supervisor around and do damage not just to himself but to his fellow employees. Ninety percent of the victims, we are told, are fellow employees.

Now, that is too much. And let me just pursue the point. I was going to ask Mr. Collins, and I will allow either one of you to give me this response. But you make the point, both of you have made it separately, that by, as you term it, jamming random testing down the throat of the employees, we are going to jeopardize all the good work that has been achieved by the Red Block system and other voluntary systems.

Well, I submit to you gentlemen that there is no logic in that. To the contrary, if there is someone who has managed to evade all of your well intended efforts in the Red Block program, and who comes to work impaired, notwithstanding your best efforts and best intentions, then that is damned cold comfort to the people whose safety he is impairing, and to the contrary, logic is on the side of the argument that says if I am a secret drinker, or if I am a secret user of drugs, right now I probably think I can get away with it because I am damned clever and I will not show it and no one will be injured. But by God, if I think that I am going to have to undergo random testing and one day suddenly be confronted with the fact that I am full of stuff when they take a urine specimen, and I am not volunteering it, then it may occur to me that perhaps I had better become involved in your Red Block program or I may not work.

Mr. COLLINS. Senator, I do not know if I can answer fully all of the questions you raise, but I would have to say that first, that an industry that is geographically laid out as the rail industry is will never completely address the problem until we get the people impacted by the problem involved in the solution.

As I told you before, we have at least 5,000 people now in the prevention teams on three railroads. They are the watchdogs of the program. Random testing will not accomplish anything better than what these prevention teams do because they know the people with the problems, and they are the ones who address the problems in our ranks or the ranks of other rail workers.

So random testing—as a matter of fact, we have a concept of random testing in the rehabilitation side. When a man goes into a program or a woman goes into a program, they are subjected to random testing until such time as the counselor can approve of their return to service.

So I think, my own belief is, from my own experience, that the prevention teams, the concepts of prevention teams are far superior to addressing this problem.

As I told you, we have had a rigid rule in the industry for 100 years. It has not worked. There is no reason to believe that a stronger implementation of Federal rules are going to do any better in an industry such as ours.

Senator WILSON. And sir, I would respectfully have to differ with you because you emphasize, as has Mr. Mann—in fact, he said it a moment ago. He said the purpose of random testing is prevention. That is the purpose of all testing. The purpose is not to be punitive, it is to get people off the roads, it is to get people out of the cabs, out of the cockpits because they constitute a threat to themselves, to their co-workers and to their passengers.

Now, there is nothing, I will tell you, that jeopardizes the success of your voluntary prevention program by making it mandatory to include an element of random testing that will keep everybody honest, including those problem drinkers, those alcoholics who think they are so damned clever that they are fooling everybody, and including those who are not detected because there is no supervisor there to detect them.

If they know that one day their number may come up, they have got an incentive they do not have now and will never have under a totally voluntary program.

Mr. COLLINS. I do not agree with you at all, Senator, because as I see it, the reverse is true. I believe that the prevention team concept works, and where it is working on CSX, UP, Burlington Northern, has a far greater chance of success than any other program.

Random testing, the whole concept, you live in a different world than we do. The harassment that would come from random testing would jeopardize, as I told you before, in my belief the programs.

Remember, these programs do not just deal with chemical substances. The biggest problems in the rail industry are one, alcohol, two, emotional problems of people, and three, drugs. So we are concerned with a broad gamut of behavioral problems of people, not just substance abuse, not only for the employees, but for the families, and anything that would jeopardize the support for those employee assistance programs, as I see it, would be detrimental to what we are attempting to do.

Senator WILSON. Mr. Collins, let me just ask you one final question.

The prevention teams that you have got out there working now are great. That is fine. The problem that I have with it is that they are not going to be 100 percent successful, nor will they be as successful as that program would be if supplemented by random testing.

My question to you is very simply this: Do you believe that a police officer, a highway patrolman who upon observation of a driver who appears to be behaving erratically, weaving, making strange lane changes, do you think that it is proper for that officer to pull that driver over and conduct a road sobriety test?

Mr. COLLINS. Yes. And we have the same thing in the rail industry if I walked across the line and was considered to be impaired or not qualified to perform service. A railroad superintendent or a trainmaster on sight observation could remove me from service.

Senator WILSON. All right, let me ask you the question then. Since that occurs in every city in the land, every state in the nation, are you satisfied that we have got all the drunks off the street?

Mr. COLLINS. Senator, we will never see that in Washington or anyplace else because we are a drug using society. There is no sense in trying to conclude that all of the drugs are going to be wiped out of any kind of an environment. They are going to be there.

Senator WILSON. Mr. Collins, that is a cop-out. We are indeed a drug using society. And that is no excuse. We do not shrug it off, we do not throw up our hands, we do not, in this country, begin to make the effort that we should to deal with that problem either with kids, and certainly not with people who are entrusted with the lives and safety of others.

Mr. COLLINS. I agree with you, Senator.

Senator WILSON. Now, I will just say this. We are talking about a situation not where I get into a car and endanger my own life and perhaps that of the person with whom I have the head-on collision. We are talking now about people to whom is entrusted the safety of dozens of hundreds of lives at one time.

I think that, with all due respect, the decision of the Ninth Circuit is a travesty. It indicates to me a total inability to be able to weigh the comparative rights of others when they are in conflict. The right against unreasonable search and seizure, it seems to me, has been tortured to death in this instance by people who are concerned not with what I conceive to be an academic principle, but who evidently are incapable of seeing the threat that the academic application of that principle constitutes to the lives of dozens, hundreds, thousands of people who are passengers on public transportation systems.

Thank you, MR. Chairman.

The CHAIRMAN. Mr. Collins, Mr. Mann, the committee thanks you both very much for your appearance here today.

Mr. Riley, would you come back up, please?

Mr. Riley, would you like to make any comments about the CSX agreements and any other comments you would want to make?

Mr. RILEY. Mr. Chairman, I have a copy of the agreement in my possession, and let me submit it for the record.

The CHAIRMAN. It will be included.[1]

Mr. RILEY. The testimony has been offered that this agreement is not an alternative to random testing.

If you look at section 19 of the agreement on page 13, it specifically says that the agreement will terminate upon the implementation of a random testing program.

The testimony has been offered that it does not preclude testing after signal running and various major rule violations. If you turn to the operative provisions in sections 1 and 2 on pages 2, 3, and 4 of the agreement, you will see that unlike the Federal Railroad Administration program, one cannot reasonable cause test an employee simply because he ran through an absolute stop signal.

---

[1] The agreement was not reproducible, but is in the Committee files.

That is precisely the kind of conduct that is killing people, Mr. Chairman. That is precisely the kind of conduct that we have found from our experience at places like Chase does correlate to drug use and I believe it is essential for an effective program to permit testing after that kind of an incident.

Now, there are other comments I could make. I do want to point out that under the disqualification provisions on page 8 in section 11a, an employee who tests positive is not fired; he is given a medical disqualification, which means that he goes through the equivalent of our bypass program and can be reinstated. But the difference between this and ours is under our program every employee has that right, but if he chooses not to exercise that right, brings drugs to the workplace and causes a fatality, he can be fired.

Under this program he is persistently recycled again and again and again and again through the system. I do not think that protects public safety and I do not think that helps the employee because one of the essential elements of any rehabilitation program is the acceptance of responsibility, and you cannot help an employee to get his life turned around if he is told that he can fail repeatedly in this process and cycle back into the workforce.

There is a broader comment I would like to make. I do not want to come and criticize this agreement. I think the fact that there was an agreement at all between labor and management on any kind of testing is a step in the right direction. I simply want to correct some inaccuracies that have been stated about it.

It is not, as alleged, broader than the FRA rule. In fact, it is significantly narrower than the FRA rule.

Now, is it a solution in and of itself that we should pursue in lieu of random testing? The answer to that is clearly no. What has not been mentioned to the committee is that this program has only been in effect for six months, for six months. We do not know what its implications are. In fact, during the 12 month period prior to the implementation of this agreement, there were two accidents on the CSX system where one or more employees tested positive. In the six months following the agreement, there was one accident on the CSX system, precisely the same ratio.

To me those numbers are so small that they do not tell us whether it is good or whether it is bad. But the point is there has been no discernible change.

Now, I noted that it was alleged during the previous testimony, and it is stated in Mr. Mann's testimony at page 3, that only about 3 percent on the CSX system tested positive, below the national average. But if you turn over to the next page of his testimony, on page 4, he says we do not have specific figures from CSX because of the confidentiality of testing.

This is an estimate. It is an estimate. I have no better estimate. In fact, CSX has one of the best drug programs in this industry. They have one of the best voluntary programs in this industry. Their failure rates have for years, long before this agreement, tended to be lower

than other railroads because they do well. I am optimistic that we have an agreement between labor and management. That is the good side.

But let's not represent it as anything less or anything more than it is. You certainly cannot point to this agreement in its six months of operation and say it has cleaned drug use off the CSX system. You certainly cannot say that it is a broader program than the FRA program. It is substantially narrower.

And because it precludes random testing, it is subject to all of the arguments that you and I have raised about reasonable cause testing programs.

Finally, I cannot help but note that in the first page of Mr. Mann's testimony, as I was sitting there reading it, he bitterly criticizes the irresponsible testing that led to the Washington Post article showing Federal drug testing non-failsafe, and then praises the testing used under the CSX plan.

Mr. Chairman, they use the same lab. It is Compuchem. It is exactly the same lab and I will submit for the record the Compuchem form that is used in the CSX program to refer samples to that lab.

The CHAIRMAN. It will be included by reference.

Mr. RILEY. Finally, if you look at page 8 of the CSX agreement, and they have criticized the principles and the safeguards included in our rule, claiming CSX is better, if you look at page 8, and I quote, "The chosen laboratory must observe established FRA mandated chain of custody requirements and have appropriate safeguards for the handling of the- samples.' They use the same requirements we do. And they are good requirements.

The CHAIRMAN. Well, that puts the solutions in perspective.

We appreciate your appearance and the others here today.

The committee will be in recess until the call of the Chair.

[Whereupon, at 2:05 p.m., the committee recessed subject to the call of the Chair.]

83-232 (88)